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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1951

No. [redacted] 10

UNITED STATES OF AMERICA, EX REL., WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No.

UNITED STATES OF AMERICA, EX REL., WILLIAM H. GIESE,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 10143

UNITED STATES OF AMERICA EX REL. WILLIAM H. GIESE,

Relator-Appellee,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of December (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Forty-Nine and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, December 16, 1949.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

United States of America, ex rel. William H. Giese,
Relator,
vs.
S. J. Chamberlin, Fifth Army Commander, 1660 East Hyde Park Boulevard, Chicago, Illinois, and Alexander H. Cummings, Fifth Army, Commanding Officer, Fort Sheridan, Illinois,
Respondents.
No. 49-C-1903.

Be It Remembered, that on the 13th day of December, 1949, the above-entitled action was commenced by the filing of the following Petition for Writ of Habeas Corpus in the Clerk's office of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judges of Above-Entitled Court:

William H. Giese, above-named relator, by his attorney, Abner F. Bond, respectfully represents unto this Court:

1. That the above-named relator, a citizen of the United States of America, is now illegally and contrary to law, under arrest, restrained and deprived of his liberty by the above-named respondents.

2. That in March, 1930, your relator enlisted in the United States Army for a period of three years.

3. That in July, 1930, your relator went absent without leave from the United States Army.

4. That in 1935 or 1936, your relator tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter; that said Sheriff, seeking a $25.00 reward for deserters, notified the Federal authorities, namely the Federal Bureau of Investigation or the United States Army, reporting your relator's tender; that pending a response from said notification, said Sheriff held your relator in confinement; that, a few days subsequently, said Sheriff received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that your relator was not wanted, whereupon your relator was released.

5. That in July, 1942, he was arrested by the Federal authorities and placed in Army custody at Fort Sheridan, Illinois.

6. That on March 16, 1944, he was inducted into the United States Army.

4 7. That on or about June 29, 1946, after twenty-one months overseas service, having been awarded three battle stars and having attained the rank of sergeant, your relator was honorably discharged from the United States Army.

8. That in July, 1948, your relator was arrested by the United States Army Military Police and granted partial liberty only on the condition that he report to them twice each week.

9. That since February, 1949, your relator has been taken into custody, placed under arrest and has been under restraint and/or confinement by order of an Army officer whose name is unknown, in the Post Guard House, Fort Sheridan, Illinois.

10. That said arrest, restraint, detention and deprivation of the liberty of the relator by the respondents is in violation of his rights under the Fifth and Sixth Amendments of the Constitution of the United States, in that he is deprived of his liberty without due process of law.

11. That at the times your relator was restrained by the Army Military Police and was taken into custody, he was and is now a private citizen, and he was not at those times and is not now a member of the United States Army or subject to the jurisdiction thereof.

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12. That S. J. Chamberlin is presently on active duty in the United States Army as Fifth Army Commander, 1660 East Hyde Park Boulevard, Chicago, Illinois.

13. That Alexander H. Cummings, Fifth Army, is presently on active duty in the United States Army as Commanding Officer of Fort Sheridan, Illinois, and that the Post Guard House in which your relator is incarcerated is under the direct control and supervision of said Commanding Officer.

Wherefore, your relator prays that a Writ of Habeas Corpus may be granted and issue, directed to above-named respondents, commanding them to produce the body of your relator before your Honor forthwith at a time and place to be specified, then and there to receive and do what your Honor shall order concerning the detention and restraint of your petitioner, and that your petitioner be restored to his liberty as a private citizen.

Abner F. Bond,
Attorney for Relator.

Abner F. Bond
10 S. LaSalle St.
STate 2-3872

5 State of Illinois } ss.
County of Cook }

Abner F. Bond, Attorney for the above-named relator, being duly sworn on oath, says that he has read the foregoing petition, has knowledge thereof, and that the statements and facts contained therein are true to the best of his knowledge and belief.

Abner F. Bond.

Subscribed and sworn to before me this 12th day of December, 1949.

Esther Corder,
Notary Public.

(Seal)

6 And on the same day, to wit, on the 13th day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

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7 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

On motion of the relator, the Court being fully advised in the premises, it is

Ordered that Writ of Habeas Corpus issue instanter herein, as prayed in the Petition therefor, returnable before this Honorable Court on December 16, 1949, at 10:00 o'clock, A. M.

8 And afterwards on, to wit, the 16th day of December, 1949, came the Relator by his attorneys and filed in the Clerk's office of said Court his certain Jurat for Petition for Writ of Habeas Corpus in words and figures following, to wit:

9 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

JURAT FOR PETITION FOR WRIT OF HABEAS CORPUS.

State of Illinois }
County of Cook } ss.

William H. Giese, relator in above-entitled cause, being duly sworn on oath, says that he has read the Petition for a Writ of Habeas Corpus, hitherto filed herein on December 13, 1949, by his attorney, Abner F. Bond; that he has knowledge of the statements and facts contained therein and that the same are true.

William H. Giese.

Subscribed and sworn to before me this 16th day of December, A. D. 1949.

Charles A. Sistek,
Notary Public.

(Seal)

Abner F. Bond,
Attorney for Relator.

Attorney for Relator
Abner F. Bond
10 South LaSalle Street
STate 2-3872

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10 And on the same day, to wit, the 16th day of December, 1949, came the Respondent, Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, by his attorneys and filed in the Clerk's office of said Court his certain Return to the Writ of Habeas Corpus in words and figures following, to wit:

11 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

RETURN TO THE WRIT OF HABEAS CORPUS.

To the Honorable Michael L. Igoe, Judge of the District Court of the United States for the Northern District of Illinois.

Now comes the respondent Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, by his attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and makes the following return to the writ of habeas corpus directed to him:

1. That the respondent denies the allegations set forth in paragraphs 1, 4 and 11 of the relator's petition.

2. That the respondent denies so much of paragraph 7 of the relator's petition which alleges that the relator was awarded three battle stars.

3. That the respondent denies the allegations set forth in paragraph 10 of the relator's petition, and states the fact to be that the relator has not been deprived of his liberty in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, and is not being deprived of his liberty without "due process of law".

12 4. The respondent admits the provisions of paragraph 12 of the relator's petition, but avers that same are immaterial in that Lieut. General Stephen J. Chamberlin has not been served with any court order in this cause.

5. The respondent admits paragraphs 2, 3, 5, 6, 8, 9 and 13 of relator's petition.

6. In obedience to the said writ of habeas corpus, the respondent herewith produces before the court the body of the said William H. Giese.

7. Your respondent respectfully alleges the facts and circumstances to be as follows:

That the relator enlisted in the United States Army, Company G, 59th Coast Artillery Corps, on or about February 2, 1926 and was discharged on or about February 1, 1929; that he reenlisted in the United States Army on or about March 12, 1930 for a period of three years; that he went absent without leave, without proper authority, on or about July 2, 1930, from the 3rd Infantry Division, Fort Snelling, Minnesota, and remained absent without proper authority and in desertion until August 1942, at which time he was apprehended and returned to military control at Fort Sheridan, Illinois; that on or about the 13th day of October 1942, pursuant to the Extension of Service Period Act, dated December 13, 1941 (hereinafter referred to), he was restored to duty at Fort Sheridan, Illinois, for the duration of the war plus six months; that on or about October 29, 1942, he was transferred to Company F, 362nd Infantry Regiment, 91st Infantry Division, Camp White, Oregon; that on or about March 15, 1943 he again went absent in desertion; that on or about March 16, 1944 he again enlisted, by way of induction into the Army; that on or about June 29, 1946 he was given an honorable discharge from the Army having served with the 746th Railway Operating Battalion.

13 That in July 1948, the Criminal Investigation Division of the United States Army contacted the relator, and, subsequently, after investigation placed him in arrest in February of 1949.

That pursuant to a court martial convened at Headquarters, Fifth Army, Chicago, Illinois, the relator was tried and convicted for the crime of desertion under the 58th Article of War and was sentenced as follows:

"To be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the reviewing authority may direct for three years."

That thereafter the Commanding General of the Fifth Army reduced so much of the sentence as pertained to confinement to ten months, and mitigated the "dishonorable discharge" to a "bad conduct discharge".

That the said court martial record, findings and sentence have not been acted upon under the Army Review System or by the Judge Advocate General, which provides for a review of the record, findings, and sentence by a Board

of Review and approval by the Judge Advocate General of the United States Army.

8. It is respectfully submitted to the court that the following jurisdictional questions are herein involved, and if the court finds any one of them to be valid, it is sufficient for the Army to retain jurisdiction of the relator:

a. The respondent alleges that the relator's enlistment dated on or about March 16, 1944 was fraudulent under the provisions of 10 U. S. C. 1499 (Article of War 28) and 10 U. S. C. 1526 (Article of War 54), in that the relator willfully misrepresented and concealed his qualifications at the time of the enlistment as he did not reveal his former enlistment and desertion; it therefore
14 follows that the discharge which the relator received on or about June 24, 1946 is accordingly a fraudulent discharge.

b. The respondent alleges, assuming the discharge of June 24, 1946 to be valid, that that said discharge was only a discharge for the period of March 16, 1944 to June 24, 1946, pursuant to the provisions of 10 U. S. C. 1580 (Article of War 108), and respectfully states that that discharge did not affect the relator's discharge entered into on or about March 12, 1930 from which the relator was never discharged. Citing the Manual for Courts-Martial, United States Army, chapter 4, paragraph 10, pages 9 and 10.

c. The respondent alleges, again assuming the discharge of June 24, 1946 to be valid, that the said discharge in itself would not preclude the relator from being subject to court martial trial under the provisions of Article of War 94, 10 U. S. C. 1566 (Frauds Against the Government). Citing *Hirschberg* v. *Cooke*, 336 U. S. 210, 215; *Ex parte Joly*, 290 Fed. 858, 860.

d. The respondent further alleges that the relator has not exhausted his remedies under the Army Court Martial System and further states that the Board of Review and the Judge Advocate General of the United States Army has not acted on the court martial proceedings heretofore held at Fifth Army Headquarters, Chicago, Illinois; further that the relator has not sought a new trial, which he has a right to do and which is prerequisite to the exhaustion of his remedies. Citing 10 U. S. C. (Article of War 53), *Welchel* v. *McDonald, Warden*, 176 Fed. 2nd 260; *Spencer* v. *Hunter*, 177 Fed. 2nd 370.

9. The respondent further states that the relator's

constitutional rights were not violated and that he was accorded "due process of law" in that the Congress of the United States, pursuant to the Constitution, has promulgated statutes for the Government of the Army.

15 10. The relator neglected to aver in paragraph 5 of his petition that he was apprehended from his desertion in 1930, in August of 1942, and restored to full duty at Fort Sheridan, Illinois, on or about the 13th day of October 1942; that on or about the 29th day of October 1942, he was transferred and reassigned to the 91st Infantry Division at Camp White, Oregon; that he did absent himself in desertion on or about the 15th of March 1943 from his said place of duty at Camp White, Oregon.

It is submitted to the court that when the relator was restored to full duty at Fort Sheridan, Illinois, on or about the 13th day of October 1942, that same was done by a special Army order, pursuant to the provisions of "Territorial Use of Army and Extension of Service Period Act," dated December 13, 1941, which automatically extended the enlistment of Army personnel for the duration of the war plus six months.

Wherefore, your responednt having made a full and true return to the Writ of Habeas Corpus heretofore issued herein, prays that the said Writ of Habeas Corpus be discharged; that the petition for Writ of Habeas Corpus be dismissed, and that the relator be remanded to the custody of the respondent, to be dealt with according to the law of the United States of America.

Otto Kerner, Jr.,
United States Attorney.

16 State of Illinois, } ss.
County of Cook. }

Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, Respondent in the above entitled cause, being duly sworn upon oath states that, all and singular, the allegations herein contained are true as he verily believes.

Alexander H. Cummings.

Subscribed And Sworn to before me this 16th day of December, A. D. 1949.

Wm. Markheim,
Notary Public.

(Seal)

17 And afterwards on, to wit, the 16th day of March, 1950, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had on December 16, 1949, before Honorable Michael L. Igoe, Judge, in words and figures following, to wit:

18 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—49-C-1903) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, commencing at 10:00 a.m. Friday, December 16, 1949.

Appearances:

Mr. Abner F. Bond, appearing for Relator;

19 Mr. Otto Kerner, Jr., U. S. District Attorney, by: Mr. Melvin L. Klafter, Ass't U. S. District Attorney, appeared for Respondents.

20 The Clerk: Case No. 49 C 1903, United States of America, ex rel. William H. Giese, Relator, *vs.* S. J. Chamberlain and Alexander H. Cummings, return on writ of habeas corpus.

The Court: Is there to be a contest on this?

Mr. Klafter: If your Honor please, last Tuesday at the time this case was first presented your Honor made the return date today and we just got certain papers in the office yesterday morning, so it was almost impossible to get a return ready by today.

I believe, under the statute, we can have a little more time to ask the Court that the case be put over and return made next Tuesday or Wednesday, if possible, because by that time we can file a return.

Mr. Bond: I wish to protest strongly against that.

You will recall the main question here is whether the man is in the Army or not.

The Court: Yes.

Mr. Bond: And I suggested at that time that he could

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call up and find out whether he was discharged, as I have a copy of the discharge here that is sworn to and I also have a case here that is on all fours which shows that this man was really discharged.

The Court: It shows he was discharged in June, 1946?

21 Mr. Bond: Yes.

The Court: What are they holding him on?

Mr. Klafter: In the first place, the Government claims that this is a fraudulent discharge.

The Court: You say that this is a fraudulent discharge, what do you mean by that?

Mr. Klafter: Inasmuch as the enlistment was fraudulent, therefore the discharge was fraudulent.

The Court: How long was he in the Army?

Mr. Bond: This question was—

Mr. Klafter: Just a minute. Let me finish, please.

Mr. Bond: All right.

Mr. Klafter: This man originally enlisted in the Army in 1926. He was discharged in 1929. He again re-enlisted in 1930 and about two months after he re-inlisted he stayed absent in desertion until the military authorities picked him up in 1942, and then pursuant to the Service Extension Act, which automatically puts deserters and persons on enlistment in the status of soldiers, the man went back to duty in Fort Sheridan and was there transferred out to Camp White in Oregon and he went absent from there and stayed absent from that camp, and stayed away until by induction—and that is where we have to get our facts straightened out—he enlisted by induction

22 I believe in 1944, by way of induction, and that is the discharge there for the induction from 1944 to 1946.

The Court: This is all right, though?

Mr. Klafter: We still say that is a fraudulent discharge by reason of the fact that it was a fraudulent enlistment in 1944.

The Court: Here is a man with a certificate of discharge showing that he is properly discharged from the Army, the certificate of discharge with a testimonial of honest faithful services to his country, that certainly imports verity. I don't know how much further you can go.

Mr. Klafter: I believe that we can go behind it.

The Court: I seriously doubt that you can go behind it.

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Just how can you go behind a situation like that?

You mean the army can reach out and bring this man in here and say, "Under our rules the enlistment was fraudulent, the discharge was fraudulent and we are now going to punish him"?

Mr. Klafter: That is number one, number two in this matter is that that is only a discharge from 1944.

The Court: Do you mean to say that you are going to hold him for some military term before 1944?

Mr. Klafter: Yes, because there is another enlist-
23 ment and Congress has passed a statute, if the Court please, in the 108th Article of War which says a man will only be discharged for a specific contract period, and that contract period there is from 1944 to 1946, and on the original contract of enlistment, from 1930 on, he has never been discharged from that.

The Court: They knew about it at the time they issued this discharge.

Mr. Klafter: No, sir, and that is the reason why it is fraudulent.

And the serial number, every man is given a serial number when he enters the services, and the serial number on the discharge is different from the serial number on his previous enlistment.

The Court: What do you say about that?

Mr. Bond: I say, sir, here is a case, I do not agree with everything that he has said.

The Court: We are not going to decide everything right now.

Mr. Bond: Here is a case on all fours with this.

Mr. Klafter: That is the Drainer case, and that is different.

The Court: What is different about it?

Mr. Klafter: The Rules of Court Martial are a lot
24 different in the Army, the basic law, the Navy, if your Honor please, are still using the laws that they originally had and the Army has been amended from time to time pursuant to the Acts of Congress that have been promulgated even as late as last year.

Mr. Bond: I believe you can change the name Army to Navy and change the name Roberson to Giese and make your decision.

The Court: What time for your return do you wish?

Mr. Klafter: That is what I am asking your Honor.

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The Court: Make your return at two o'clock. This gets to a place where it is ridiculous, where they evidently attempt to put the Army and Navy over and above the law of this country. One other Judge around here ruled on some matter like this, and if the Army and Navy officials are going to continue to act like this, they are going to run head on with some of the Judges around here.

Continued to two o'clock and make your return at that time.

(Thereupon, an adjournment was taken in the above-entitled case to 2:00 o'clock p.m. of the same day, Friday, December 16, 1949.)

25 2:00 o'clock p.m.
Friday, December 16, 1949.

Court met pursuant to adjournment.

Appearances:

Mr. Bond

Mr. Klafter.

The Clerk: Case No. 49 C 1903, United States of America, ex rel. William H. Giese *vs.* S. J. Chamberlain and Alexander H. Cummings, return on writ of habeas corpus.

Mr. Klafter: If your Honor please, here is a return on the writ, and counsel has been served with a copy of that return.

26 The Court: Is that right?

Mr. Bond: That is right.

The Court: Very well, you may proceed.

Mr. Bond: In the return respondents admit the discharge but they allege that it was a fraudulent discharge because they allege that at the time of the induction relator did not reveal his previous enlistment in the Army. Of course, the relator denies any fraud, but for the purpose of settling this summarily, under the Habeas Corpus Act, I submit to your Honor that even, just assuming, that there was fraud under the cases, I show you right here in 69th Federal Supplement 661, at Page 664, a case on all fours.

Now, in that case, which is the case of *United States ex rel. Flannery* v. *Commanding General, Second Service Command et al.*, they say—it is a short case and is on four white feet with the situation here—it holds substantially

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that a discharge is not revocable or cancellable even for fraud.

The Court: Let me see if I understand what this case is all about.

From the standpoint of the Army you allege in your petition that in March, 1930, he enlisted in the Army for a period of three years.

27 Mr. Bond: Yes.

The Court: And in 1930 he went absent without leave.

Mr. Bond: Yes.

The Court: Then later on, in December, 1935, or 1936, he surrendered to the Sheriff of McLean County.

Mr. Bond: Yes.

The Court: Who contacted the officers of the United States Army and they reported that they did not want him?

Mr. Bond: That is right.

The Court: And then in 1942 he was arrested. In the meantime, had he enlisted again?

Mr. Bond: No, sir.

The Court: That 1942 arrest was for the 1930 desertion?

Mr. Bond: Yes.

The Court: And he was placed in the custody of the Army at Fort Sheridan and shipped out to Oregon and then he was absent from then until 1944.

Mr. Bond: No, I contend at that time he was no longer in the Army, and in 1942 he was illegally in the Army.

The Court: Well, anyway, in 1944 he went back into the Army?

Mr. Bond: Was regularly inducted.

The Court: And he served then until 1946?

28 Mr. Bond: Yes.

The Court: And was discharged, after being awarded three battle stars and after attaining the rank of sergeant.

Mr. Bond: And the respondent denies that he received three battle stars and alleges that the discharge was fraudulent. I submit that the question before your Honor now is the effect of the discharge.

The Court: Is the discharge, is that disputed as to its authenticity?

Mr. Bond: I offer it is evidence.

The Court: Does the Government say it is not authentic?

Mr. Klafter: That is a question, I will not say it is a good discharge, it is a discharge certificate, but predicated on fraud because of the fraudulent enlistment by way of induction in 1944, so it logically follows that the discharge is fraudulent.

The Court: You do not dispute the authenticity of this discharge?

Mr. Klafter: Not the execution of this certificate of discharge.

The Court. I am trying to get through my head just what went on, he went back into the Army in 1944 and finally was discharged in 1946?

29 Mr. Bond: Yes.

Mr. Klafter: If I may interpose, your Honor, I think I can straighten this matter out.

The Court: Yes.

Mr. Klafter: The first time he was in the Army was in 1926. He served that enlistment period from 1926 to 1929. He was discharged from the 1926 enlistment and re-enlisted in 1930. In 1930 he was absent in desertion and was never brought back to military control until 1942 at which time he was restored to duty pursuant to the Service Extension Act of 1941 which provides, in effect, that all persons subject to the Military, shall be brought back into the service for the duration of the war, plus six months.

He was restored to full duty here at Fort Sheridan, Illinois, and was sent to Camp White, I believe it is in Oregon, and went absent from that enlistment in 1943. In 1944 he was again enlisted by way of induction.

At the time of that induction he signed certain papers which I can show to your Honor—I will put them in evidence later on—where he never revealed his prior enlistment of 1930 or that he was ever discharged from that enlistment.

30 The Court: You knew about the 1943 difficulty?

Mr. Klafter: No, sir, we never knew about the desertion in 1943.

The Court: Don't you have fingerprint records or anything like that?

Mr. Klafter: If your Honor please, that was during the time of war and they did not discover that fraud until 1948 when the C. I. D. of the Army, through the fingerprinting department, found that there had been a fraud perpetrated.

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In furtherance of this I would like to say that his enlistment of 1930 assigned a different serial number to this relator than his enlistment of 1944.

The Court: What are they punishing him up there for now?

Mr. Klafter: Up there they are now punishing him for desertion.

The Court: Desertion only?

Mr. Klafter: From the 1930 enlistment. Here is the point, if the Court please—

The Court: Are there any statutes of limitations that bind the Army or are they above every kind of law?

Mr. Klafter: If the Court please, he was brought back into the Army in 1942.

31 The Court: That was twelve years later.

Mr. Klafter: He was brought back into the Army by an Act of Congress in 1942 which says all persons subject to the Military shall be brought back into service.

The Court: That is still twelve years after the 1930 situation, and even if it was an Act of Congress you mean to say that he is under punishment for this alleged violation that occurred in 1930?

Mr. Klafter: No, he is under—

The Court: That is what I asked you.

Mr. Klafter: Yes, but he is under punishment for the 1943 Act, when he took off.

The Court: I asked you a while ago about that.

Mr. Klafter: I probably did not make myself clear.

The Court: I think you made yourself clear because you said this action of 1942 made him amenable to that law.

Mr. Klafter: This man is charged with desertion as of March 15, 1943. That is what he is being charged with right now.

The Service Extension Act for the duration of the war plus six months was in effect from December 17, 1941, until July 25, 1947, and at that time Congress said for all of these types of purposes the war had ended, the emergency had ended.

32 So, actually the only time they could have really checked this man was from 1947 to 1948, when they did. They did every thing that was humanly possible to do so.

The Court: Are these the facts: after the second desertion in 1943, he got into the Army by enlistment, or by induction?

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Mr. Klafter: Yes.

The Court: And he did serve over two years?

Mr. Klafter: Until '46, yes, sir.

The Court: And he was then discharged?

Mr. Klafter: And he was then discharged but in giving him that discharge certificate the Army did not know, because of the fraud, as we contend, that he had been a deserter in 1943.

The Court: Now counsel makes reference to some cases here.

He makes reference to one case that is pretty good.

Mr. Klafter: The Flannery case?

The Court: No, the Drainer case.

Mr. Klafter: The Drainer case, and I would like to comment on that case with the Court's permission.

The Court: What is your comment?

33 Mr. Klafter: If your Honor please, there are two sets of statutes promulgated by the Congress, one for the Army and one for the Navy and they are quite different from each other.

The Army has a statute which says, in specific cases of this sort, that the man shall be guilty of desertion, and each successive enlistment is a fraudulent enlistment, and no such statute is in effect in the Navy.

The Court: You say this is based on the statute?

Mr. Klafter: Yes.

The Court: The Navy case?

Mr. Klafter: No, sir, the Navy case is based on regulations, and that was overruled because it was based on a regulation and not on a statute.

Now, the 108th Article of War, in 10 U. S. C. 1580—may I read that to the Court, it says:

"No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a Field Officer of the Regiment or other organization to which the enlisted man belongs or by the Commanding Officer when no such Field Officer is present; and no enlisted man

34 shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the Commanding Officer of the Department, or by sentence of a General Court Martial."

The Court: You were just reading from the statute; how is that applicable to this?

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Mr. Klafter: It says specifically "no enlisted man shall be discharged from a period of enlistment." That is not for the same period of enlistment that he claims to have been discharged, that discharge says, if you will look at the second part of it, that runs from 1944 to 1946.

The Court: And I understand you admit that so far as that particular part of the service is concerned, that discharge may be all right.

Mr. Klafter: Yes, that discharge, but I say the discharge was fraudulent because—

The Court: And the position you take is that it does not discharge him from the previous enlistment?

Mr. Klafter: Yes, I say that is so because it was obtained through fraud.

I can go one step further on that, in *United States ex rel. Hirshberg*, 336 U. S., the Supreme Court specifically
35 said where there has been fraud perpetrated after the discharge, the enlisted man who perpetrated the fraud—

The Court: You do not allege any fraud after the discharge?

Mr. Klafter: I mean prior to the discharge.

The Court: You said after the discharge.

Mr. Klafter: Yes, but I meant prior to the discharge. He is still subject to the Military, if there is fraud in the discharge he can still be brought back.

The Court: He is still subject to that fraud?

Mr. Klafter: Yes, under the 94th Article of War.

The Court: How long do they keep control of people?

Mr. Klafter: As long as there is a fraud they can keep control of them, your Honor.

The Court: What does that state on it? I don't know just how a man will ever get out of the Army when someone might come along and say, "You did something fraudulent so you are still in the Army and we will pick you up."

Mr. Klafter: Reading from the 94th Article of War, 10 U. S. C. 1556, it enumerates a number of things down to the end and then it says there at the end:

"And if any person being guilty of any of the of-
36 fenses aforesaid while in the military service of the United States is discharged or is dismissed from the service, he shall continue to be arrested and held for trial and sentenced by a court martial in the same manner and to the same extent as if he had not received such discharge or been dismissed."

That is in the United States Code, if the Court please, and in addition to that the Manual of Court Martial prescribed by the President and approved by Congress,—which is the law for the Government and the Army—says, in Paragraph 10, Chapter 4, Page 9, if I may have the Court's indulgence, I think it is important—and I might differentiate at this time by saying to the Court that there is no provision in the Navy regulation, and that is where I think the distinction is in the Drainer case:

"The general rule to be followed in the Army is that court martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed dur-
37 ing a period of service thus terminated is not revived by re-entry into the military service."

With these exceptions to the general rule:

"Jurisdiction as to certain cases of conspiracy, fraud and stealing is not terminated by discharge or dismissal," that is Article of War 94, and that is the one I referred to a minute ago.

"All persons under sentence adjudged by court-martial remain subject to military law while under sentence."

The Court: What are you reading from?

Mr. Klafter: I am reading from Manual for Courts Martial, U. S. Army.

The Court: That is the manual for Courts Martial but it is not a statute.

Mr. Klafter: It has the effect of a statute.

The Court: And that is what they say in the Navy case. It has the effect of a statute.

Mr. Klafter: The Navy case was based on a regulation as distinguished from the Army statute.

The Court: What fraud do you say this man committed against the Army?

Mr. Klafter: The first fraud committed was when
38 he enlisted, because there was a fraudulent enlistment by reason of the fact that he had been in desertion in 1943, and that all of the moneys he retained by reason of the services in the Army, payroll, family allowance, $10,000 worth of insurance, and $300 of mustering out pay, and all of his G. I. Rights that he got by reason of the G. I. Bills, that Congress gave to him, he has taken advantage of them and we say that is tantamount to a fraud.

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The Court: Is that what you base it on?

Mr. Klafter: Yes, sir, that is the fraud.

The Court: You do not think he did anything physically by which he defrauded the Government?

Mr. Klafter: No, sir.

The Court: Except he came back and wanted to serve in the Army again and did not reveal that he had previously enlisted and had previously deserted and that constitutes fraud which you say necessitates his punishment?

Mr. Klafter: This enlistment was by way of induction and I do not think the relator had anything to say about his going into the Army.

The Court: But he did go into the Army?

Mr. Klafter: Yes.

39 The Court: And he did serve?

Mr. Klafter: Yes.

The Court: And he did receive this discharge?

Mr. Klafter: Which I claim is a fraudulent discharge.

The Court: But despite your claim he did receive a discharge and did receive the recognition that is recited in the discharge?

Mr. Klafter: No, sir, the recognition was not in the discharge, it was in the petition of the relator's.

The Court: Wasn't it in the discharge?

Mr. Klafter: I say the recommendation you talk about in there, and which the relator says he got, they are simply campaign stars, battle campaign stars.

The Court: That is what it says here, "Victory Medal, European African Middle Eastern Theater Ribbon with one Bronze Battle Star, 3 Overseas Bars, Army of Occupation Medal, Good Conduct Medal."

Mr. Klafter: Overseas Bars are for terms of service, the bars were given for length of time in the service.

The Court: He is not attempting to enlarge upon this, and you do not say he did not get these recognitions.

Mr. Klafter: Overseas Bars, there is a great deal of difference between that and Army Service Bars.

The Court: What do you call a Bronze Battle Star?

40 Mr. Klafter: He has one right there.

The Court: What is a Victory Medal?

Mr. Klafter: Everybody who was in the Army at the termination of hostilities got it, or anybody who was in Europe.

The Court: This says a Victory Medal, European Afri-

can Middle Eastern Theatre Ribbon, Bronze Battle Star, 3 Overseas Bars, Army of Occupation Medal and Good Conduct Medal, and because he did not reveal his previous military history he thereby committed fraud against the government and all of this must be wiped out?

Mr. Klafter: Yes, there are cases that so state.

The Court: All right. Have you finished?

Mr. Klafter: Yes, sir.

Mr. Bond: Your Honor, I will be very brief.

We contend, naturally, that he did not fraudulently enlist or anything else, and that case right there, the Flannery case, that is the mile-stone and states that the proclamation of the President which set out that manual that counsel has cited and quoted to you here was restricted only for the purposes of courts martial proceedings and when they start talking about the effect of a discharge on previous enlistments and so on, that is not authorized
41 by Act of Congress to the President and consequently it is unconstitutional.

That case holds that an Act of Congress provided for courts martial after discharge by Presidential proclamation, namely, the Manual of Courts-Martial and that is the present power given to the Army to cancel a discharge for fraud and return him to being a soldier, and that that was repugnant to the enjoyment and right of trial by jury.

This is, as you see, a well reasoned and sound opinion, but I will wait until you finish perusing that, if I may.

The Court: No, go ahead.

Mr. Bond: Counsel cited the case of *United States ex rel. Hirshberg* v. *Cooke*, in the advance sheet, 69, No. 10, Supreme Court Reporter, Page 530. I just picked this up and I do not see the point in there, in fact that is a habeas corpus proceeding granting the writ of habeas corpus at the end of the case, and it says this:

"Since the Army and the Navy court martial powers depend on substantially the same statutory foundation"—this is a case involving a Navy man, incidentally—

—"the opposing interpretations cannot both be right
42 unless it be assumed that Congress has left each free to determine its own court martial boundary. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's Armed Forces."

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I do not think this case, inasmuch as it grants the writ, it reverses the Circuit Court of Appeals which denies the writ, is favorable to respondent's position.

I am ready to stand on the basis of the Flannery case, and inasmuch as they admit the discharge, and if the discharge is valid, according to the cases, I cannot see any reason why you cannot release the relator without going into the facts on the tender that I set up in my petition and which the respondent denies.

The Court: What tender?

Mr. Bond: I put in a tender in Paragraph 4.

The Court: That is where you say he surrendered down in Bloomington?

Mr. Bond: In 1930 a man enlists in the Army for three years and he goes absent without leave say after one year's service, and approximately five years later he tenders
43 himself to the Army through the civil authorities who are anxious to get the reward who naturally reports to the Federal authorities, however the situation is this, the two-year statute of limitations has run and if the Army tried to try him on the desertion he could plead the statute of limitations as a bar.

So, in effect they said "We don't want you, if we do you would plead the statute of limitations and therefore we don't want you."

It is petitioner's contention that two years after he made that tender he was out of his obligation to serve and out of the Army for all time.

It simply revolves around the interpretation of the Act of Congress.

The Act of Congress says a man is not out unless he receives a discharge or is otherwise separated from the service.

Was it the intent of Congress that this man who is now 43 years old and who, in 1935, at which time he was 23, went to the Army and said, in substance: "I owe you two years," and the Army said, "We don't want you now but may want you five years or ten years or fifteen years from now but we reserve the right to recall you at
44 any time after two years." I think not.

But it worked out so that in 1942,—and he had been in his home town all of the time so far as I know—he was picked up and brought to Fort Sheridan and the so-called restoration took place.

The Court: What happened then?

Mr. Bond: The Army has a regulation that a man can be restored to duty, and the only way you can go into the Army is by being picked up or by induction.

I put it to your Honor if in those two years after 1935, in 1938 or 1939 let us say, he was not discharged.

The Court: How did he get up to the Army in 1942 or 1943?

Mr. Bond: The Army authorities had him picked up by the F. B. I.

The Court: Then what happened?

Mr. Bond: They restored him to duty and had him sign his papers.

The Court: Then what happened?

Mr. Bond: Afterwards he stayed there a while and then in 1943 he left.

I say, even if the Army picked him up forcibly and restored him to duty that that had to be based on
45 a valid enlistment.

The Court: Then what happened?

Mr. Bond: He went home and on the 16th of March, 1944, he was inducted into the Army like anybody else and any fraud or anything that is alleged to have transpired since that time is denied.

The Court: He left the Army out in Oregon in 1942 or '43?

Mr. Bond: Yes, pursuant to the time he was brought back to Fort Sheridan, and restored. They said he was restored and following that, he left.

The Court: That was on the 1930 enlistment?

Mr. Bond: That is what the respondent says but petitioner claims that he, by his tender, he purged himself.

The Court: And he did not enlist again?

Mr. Bond: No, sir. We do not have to bother about tender and so on, which is denied by the respondent, all we have to go on, I submit under the cases I read to you, especially the Flannery case says that on a charge of fraudulent enlistment a discharge cannot be revoked.

The Court: I was just going to ask that simple question, how did the Army go about stirring up fraudu-
46 lent enlistments, do they have equity powers, or what?

Mr. Bond: I am not trying to say anything improper but not many writs are brought because while these men are innocent the persons do not know their rights in it.

I appeared before Judge Shaw on that sailor case and—

The Court: That answers that simple question. Here is a fraudulent discharge. Now they say; so can they go out and say it is fraudulent and that ends it? Don't they have to go into court and give a man a hearing?

Mr. Bond: These cases seem to think they should have.

The Court: That is the reason I ask the question. I do not know whether they are clothed with all of the powers of a court of equity.

Mr. Bond: I think in a large measure it is an effort to foreclose a hearing on the discharge and Judge Shaw commented on that.

The Court: Let me see if I understand it: this man is being held out at Fort Sheridan on the charge of going absent without leave back in 1930.

Mr. Bond: It was based on that enlistment. The period was alleged from March, 1943, to February, 1949.

The Court: That goes back to the 1930 enlistment
47 and you say thereafter that he did not go up there and enlist and was not inducted but that the Army just restored him?

Mr. Bond: They restored him under some regulation.

The Court: And thereafter he went absent without leave again?

Mr. Bond: Yes.

The Court: So I say it all goes back to the 1930 enlistment.

Mr. Bond: But for our purposes it is just the question of the discharge.

The Court: I understand that but the reason they claim they hold him up there is on account of the 1930 enlistment that he did not reveal that enlistment at the time he was inducted in 1944.

Mr. Bond: That is what they claim.

The Court: Is that the way you understand it?

Mr. Bond: That is the way I understand it, that is the way I understand they claim, but I also understand, under the cases, they have no right to hold him.

The Court: All right.

Mr. Klafter: If your Honor please, on that last point that counsel just made reference to, it was not by a regulation that this man was brought back in 1942.

48 The Court: He was brought back under an Act of Congress?

Mr. Klafter: Yes, he was brought back under an Act of Congress, the 50th Appendix, U. S. C., Section 731-732.

The Court: That was because he had been in the Army in 1930?

Mr. Klafter: Exactly, yes. The second point I would like to make is this: we deny anything definitely with reference to his tendering himself to the service in 1937. There is no proof on it and we definitely deny it, and I did in my return.

Counsel makes much ado about this Flannery case and goes into great length as to what it is all about and I would like to say this, that it was reversed in the Appellate Court.

I am now reading, if your Honor please, from the case of *Kronberg* v. *White*, in the 84th Fed. Sup. Page 392, at Page 394, the Court said:

"The Flannery case was reversed by stipulation in the Court of Appeals for the Second Circuit without opinion."

The Court: It does not do either one of you very much good then.

Mr. Klafter: No, except I say he makes much ado about it and it was reversed.

It is the Government's contention, if the Court please, that there are four jurisdictional questions involved here and if the Court finds any one of them to be the fact the man is still under Army jurisdiction.

The first one is that the respondent alleges that the relator enlisted on or about March 16, 1944, and that it was a fraudulent enlistment under the provisions of 10 U. S. C. 1499, Article of War 28, which says:

"Certain acts to constitute desertion. Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter."

Now, here is the pertinent point about it, your Honor:

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the Militia when in the service of the United States, or in the Navy or the Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein."

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Also, under 10 U. S. C. Section 1526, the 54th Article of War, it says:

"Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court martial may direct,"

which is exactly the case here. He concealed his former enlistment and made misrepresentations as I pointed out previously.

I have already pointed out to the Court in the Hirshberg case in the 336th U. S., the Supreme Court case, where he said the man was discharged, that in that case there was no question of fraud involved.

Your Honor commented on this case that Judge Shaw tried here the other day and in that case there was no question of fraud involved.

51 The Judge Advocate rendered a decision on the same point and he said,—and this is the Judge Advocate for the Army and not the Navy—in a digest of opinions of the Advocate General of the Army, 1912 to 1940, at Page 381:

"A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917 which became effective as to him on August 5, 1917."

There is a case right in point, that Judge Advocate General's decision.

Further, I would like to say to the Court that the judicial position of the Army is created in like manner

52 that this Court is created under Federal powers. It is a Federal court and as all Federal courts do, it extends comity one to the other. Army court martial regulations provide for review and for new trial, as in this case here.

I will say this to the Court, that the Navy does not have that procedure.

I submit to the Court that the relator has not exhausted his rights under the military court martial system. I cite the case of *Welchel versus McDonald*, 176 Fed. 2nd. at Page 260, where the Court said, at the bottom of Page 262 and at the top of Page 263:

"Habeas corpus to review the action of another court is in its nature extraordinary and will not be used, if available at all, until other remedies have been exhausted."

Then it goes on with a group of citations:

"Article 10, U. S. C. A. Section 1525, provides for the grant of a new trial or the vacation of a sentence for a good cause shown within one year after final disposition of a court martial case; and in cases involving offenses committed during World War II the application may be
53 made within one year after termination of the war. The action taken on such applications is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the District Court on habeas corpus. That it has not been sought here is within itself a sufficient reason for non-interference."

And they affirmed the judgment of the lower court which denied the petition for the writ. That case was decided and affirmed, and that was a Fifth Circuit case from Texas.

I have a Tenth Circuit case which held absolutely the same way in the State of Kansas and that case is *Spencer versus Hunter*, 177 Fed. 2nd, Page 370.

I think it may be pertinent for the Court to know the provisions of the 53rd Article of War because it makes the decision of the military court martial binding on other courts.

"When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of this sentence shall, if the soldier be confined in the United States disci-
54 plinary barracks, or any branch thereof, be directed by the Secretary of War."

For those reasons, if the Court please, I submit to the Court that the writ of habeas corpus should be discharged and the petition dismissed and the relator be remanded to the custody of the United States Army.

Mr. Bond: Out of the District Attorney's own mouth

I will convince your Honor that if there was, assuming there was any fraudulent enlistment, it would not effect this discharge.

Do you remember the statute he read: "Any man fraudulently enlisting will be tried by a court martial and receive any punishment it may direct." What is the import of that?

The Army has jurisdiction of him. How did it get jurisdiction?

Answer: Because that enlistment was good, subsequently say he enlists fraudulently and he is tried by court martial and gets six months or whatever he gets, then what happens? He goes back and gets his discharge. Is that discharge fraudulent because he enlisted fraudulently? If there was any fraud, which I do not believe was set up, it still does not affect his discharge, that is,
55 out of his own mouth.

This issue of a tender to the Sheriff is one which you may have to try, if you cannot decide this on the basis of the discharge.

The discharge is a signed performance of an obligation and any fraud to it is remote and does not affect the discharge, if there was any fraud which we say there was not.

Suppose he proves fraud, how does that affect the discharge? I asked myself and I don't know and he does not tell us.

With reference to the Flannery case which was reversed, as he said, by agreement, that is a new one on me. The 1946 Columbia Law Review has a very exhaustive note about the case and has a footnote by the Advocate General which says this case was reversed by agreement in the Circuit Court of Appeals.

I searched the Circuit Court of Appeals and I could not find any memo or opinion on it of any kind. So I say let the record show that there was not any reversal at all by agreement, there might have been a settlement on it, and I think the import is, if anybody is going to make inferences from the record, that the Government did not
56 want to go up because if they had gone up they would have been defeated. That is for what it is worth.

I think the way the record stands the District Court's decision stands because it was not appealed.

I don't think his contention that we should wait for the President and Secretary of War to act is worthy of any reply.

These men, as I allege in my petition, first in 1942 went down and said "We want you" and they placed him in Army custody at Fort Sheridan, Illinois, and then in July of 1948 the relator was arrested by the United States Army Military Police and granted partial liberty only on the condition that he report to them twice each week and then they said "We will report to the War Department," and they then dragged him up to Fort Sheridan and he had a trial which finished on the 7th of July, 157 days ago today.

Since that time the record of that trial has been held up at the Fifth Army headquarters, and if it is going to be reviewed it has to go to Washington and go through the Board of Review, and all that, and I contemplate it would take six months or more before it reached a decision, so if they can do that to this boy, with a discharge in his hand, they can do that to me.

57 The cases that he cited, I was not familiar with them, but the cases all have dealt with due process. For example, under the 24th Article of War, that deals with his right against self-incrimination but oftentimes that right is violated and a man asks for a writ because he did not get due process, but he is still in the Army.

Here I allege that he is a private citizen with a discharge in his hand, just like I am and many others who have served. I do not think the civil courts are ready to surrender their power to the Army to that extent.

I am sure it is almost inconceivable when I have my discharge in my hand that they can say "No, we are going to take you into the military courts for a year and a half and you cannot get a habeas corpus in the meantime." That is incredible. I do not believe that is worthy of any thought at all.

In addition to that they say "You cannot get any appeal." And they say this man is military and so forth and cannot carry on the same as anybody else, to mean it is inconceivable he could not get a writ because he is in the Army.

58 I don't want to go over the same ground intentionally, and I want to straighten the situation out if I can so I would like to ask the question:

Your statute says a man can fraudulently enlist and then be tried by a court martial under the jurisdiction of the Army for a period which has gone by, and after he is tried and convicted he still is in the Army and after he has served his bat time and he gets his discharge, then is

that discharge fraudulent because of some fraud committed in the enlistment?

I say that is an answer, and I say the answer is no because it vacates the good entry into the Army and does not affect the discharge.

I want to stress again the proclamation statutes he read are passed on in the Flannery case and that case says a man has the right to a jury trial in the land and naval forces because if the Congress cannot empower the President to act, the Congress itself cannot extend court martial jurisdiction arising outside of the land and naval forces.

It is submitted that the law cited, especially the comparatively recent cases of ex parte Drainer and of Flannery not only support the relator's contention as precedent and irrefutable logic, but also on the grounds of public policy.

59 Where he is not in the Army or Naval forces they naturally try to seek his reinduction, and since reinduction for purposes of trial by court martial finds no basis in the Constitution, the only remaining basis to support the exercise of military law is that the hitherto valid discharge is a nullity.

In light of the conclusive character of a separation as terminating military status, this would amount to the utilization of a mere fiction to accomplish an otherwise unconstitutional end. The Federal courts have consistently refused to allow the use of a fiction to evade Constitutional provisions.

There can be no control or jurisdiction by the Army over the relator except by reason that he is bound to be in the Army service. This service was terminated by delivery of his discharge. The solemn act by the duly constituted representative of the Government in granting and delivering such discharge and terminating all relations between the relator and the Army should be upheld.

If the contention of the Government is to be sustained no man who has received such a discharge as is here involved would ever be able to ascertain whether he has been finally released from the service.

60 Your Honor, I think on the facts that you have before you and the cases you have before you the relator should be discharged.

Is the discharge admitted? May we have that labeled Exhibit 1 and have it received?

The Court: That is the discharge?

Mr. Bond: Yes.

The Court: All right.

(Which said document was marked as RELATOR'S EXHIBIT NO. 1 for identification and was thereupon received in evidence.)

Mr. Bond: I swore to the petition at first because the petitioner was out at Fort Sheridan, but I have here his jurat to the petition and I would like to ask it be filed instanter and I just gave a copy to the District Attorney.

The Court: I take it there is no objection to that?

Mr. Klafter. No objection to that.

The Court: All right.

Mr. Bond: I think that is plain.

I would like now to take the opportunity to review a few excerpts from the opinion in the case of United States
61 ex rel. James Joseph Roberson, relator, *versus* J. S. Keating, Commander of Naval Training Center, Great Lakes; that case, as counsel said, did not go on the question of a fraudulent discharge basis, in that case they were trying to revoke the discharge because of inadvertence so they said.

"From this it may be seen that an honorable discharge is an extremely valuable property right as well as a personal right, and to deprive a person of an honorable discharge is to deprive him of property rights, as well as civil rights and personal honor. To destroy such a certificate of title, if we wish to call it that, in an arbitrary way on a unilateral proceeding, is contrary to our ideas of democracy. This country depends upon a citizen Army and Navy, and the rights of citizens are only to be temporarily impaired, to the minimum extent consistent with national safety. To make the Army or the Navy with their court martial boards sole judge of whether a person is or is not a member of the armed forces, would be to destroy all civil rights which is unthinkable in a nation depending upon a
62 citizen army. It is perhaps deplarable that courts should interfere in any way with Naval affairs but when we come to the question of whether or not a citizen is or is not a member of the Navy, the point becomes basic and fundamental under our Constitution and must be judged by the civil courts. This can and must be done without interference with such necessary rules or regulations as may be laid down for disciplinary purposes, but no such disciplinary action can be taken unless a person actually is a member of the armed forces, and in that event any judgment rendered would be void."

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And then it goes on to say that this Naval discharge was delivered to him signed by an officer entitled to it and was recorded in the County Recorder's Office.

And then it goes on:

"I am not passing upon what the legal effect might have been had that discharge had been procured through fraud or by any wrongful act on the part of the relator. That question is not in this case, so far as this relator is concerned he fully performed his contract with the
63 Navy, received his honorable discharge and at that moment the books were closed so far as he was concerned. All of the things that are charged against him subsequent to that date are beyond the jurisdiction of a Navy court martial and are therefore void.

"The Court takes judicial notice of the fact that our country recently had armed forces of approximately ten million men and that many of those millions were discharged upon a so-called point system. In the working of this system it was necessary that the officers issuing discharges should depend upon company clerks and their division clerks to make the calculations necessary for discharge. It would be something passing a miracle if some mistakes were not made in calculating points and issuing honorable discharge. It could even be possible that some records may have been falsified and it is even conceivable that some point ratings were improperly obtained. In those cases of mistakes, which must have occurred, the man carrying an honorable discharge and entitled to be a
64 civilian would be subject to arrest and summary trial by the military if the position taken by the Navy in this case is sustainable."

And this is even more in point:

"It is my view that the clear-cut naked question of whether a man is or is not in the armed forces must be determined by the civilian courts under rules of due process.

"It follows that the orders of commitment under which this man is held are void and that the relator should be discharged."

And Judge Shaw over here says the import of this case shows it is not due process, but having decided it under a writ of habeas corpus it follows that the order is void and the relator should be discharged.

Now this is a question which would interest you and Judge Shaw. What would the Army do if they wanted to say the discharge is wrong because of fraud? Would

they go into a court of equity to clear the title or the deed or would they do something else?

Then it says:

"Other questions have been raised as to what procedure might or might not have been taken, and I am not
65 passing on those questions because they are not presently before me nor could they be in a habeas corpus proceeding."

Then he goes on:

"It was suggested in argument that some action might be taken against the certificate of discharge. I am doubtful of the ethicacy of any such action in view of the total absence of anything to indicate any wrong-doing on the part of the relator, but that is a separate matter and nothing said herein is to be deemed any ruling upon or in any way res judicata in such a situation, should it ever arise."

Now what can the Army do? Well, that is the Army's business, it is a fact on giving him a discharge he is entitled to due process on it, it is a property right and in the Constitutional construction that we are going to protect property rights we should bear even more so towards liberty. I think that is a sound rule of construction.

It is a simple thing, he is discharged. Then if the protestants claim that he was to be tried on the ground he is in the Army, wouldn't any discharge be futile and fraudulent and even if they would prove fraud under those
66 circumstances the Army cannot revoke it like a grantor deed. It has to have due process, and relator has not had due process, they have admitted the discharge.

The Court: I just want to get these dates straight.

Mr. Bond: O. K.

The Court: The discharge was dated in 1946, June 29, 1946 and he was inducted in 1944.

Mr. Bond: His induction card was dated March 16, 1944.

Mr. Klafter: But long before that he had been sent out to Oregon.

The Court: From the 1930 enlistment, in 1943 he was put back in the Army.

Mr. Bond: Actually in 1942 and he was brought to Fort Sheridan and subsequently shipped out to Oregon.

The Court: Out there he went absent without leave again?

Mr. Bond: If he was actually in the Army at that time.

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The Court: Whether he was in or out, he went absent without leave?

Mr. Bond: Then he would be lawfully absent.

The Court: Call it what you want to, he went away, what is the use of arguing about that, and then later on he is inducted in the Army under the usual process
67 of taking a man into the Army, that is the way he got in?

Mr. Bond: Yes.

The Court: And he had not been arrested as a result of his military establishment in Oregon?

Mr. Bond: No.

The Court: The next we hear of him was in 1944 when he is inducted in the Army?

Mr. Bond: Yes.

The Court: Thereafter he served and was thereafter discharged?

Mr. Bond: Yes.

The Court: Have you finished?

Mr. Bond: For the present.

The Court: What do you mean for the present? If you have anything else to say, now is the time.

Mr. Bond: I think I am entitled to the last say on this matter.

The Court: What have you, anything more to say?

Mr. Klafter: Yes. As he says, of course he is entitled to the affirmative.

The Court: It is his law suit.

Mr. Bond: I would like to close right now if I may.

Mr. Klafter: I would like to say one thing in commenting on the points that counsel has made, a couple of the
68 points that he has made, number one, the absent in desertion from Oregon was going from an infantry outfit and when he went in 1944 he went with a transportation battalion, although both served overseas.

The Court: And they are both in the Army, too.

Mr. Klafter: That is one of the points I would like to put in and also in commenting on the Robertson *versus* Keating case I would like to say this, that there was nothing with reference to fraud involved as counsel says, in that case, but 10 U. S. C. 1566 definitely states after a discharge is given a man can be brought back subject to military trial, and I think those two points are very, very important.

The Court: Without limitation?

Mr. Klafter: There is a limitation on it, yes, but the

limitation would start running as of the date of 1947. Of course I submit this to the Court that the question of limitation should not be decided by this Court, I think that is something for the court martial to decide.

I would like to say something more on the automatic re-enlistment pursuant to the Act of 1941, there have been cases cited on that particular statute, and this is the case of *ex parte Taylor*, 73 Fed Sup. 161 where the facts
69 are that he enlisted in 1938 and a short period thereafter went absent in desertion and he was returned pursuant to the automatic Extension Act of 1941, and stayed in that corp until about 1943, and then later was picked up in 1948 and he was tried by a court martial and the Court denied a writ of habeas corpus, and in that connection I would like to say there was an Act passed, an Extension Act passed by the Navy the same as there was for the Army in that case.

The statutes are very similar, and I will give them to the Court to show that that is the fact, and also that that part of the statute has been decided. There has been much ado about the difference between deception and fraud that is involved here, so I would like to read one part of this case to the Court because I think it is important.

This is the case of Hirshberg *versus* Cooke, in the 336th U. S. Supreme Court Reports at Page 215:

"But after elimination of certain provisions which would further have extended court martial jurisdiction, Congress left in the bill Section 3, now Naval Article 14 (Eleventh) which makes Naval personnel guilty of service fraud
70 subject to court martial after discharge or dismissal."

The Court: What is a service fraud?

Mr. Klafter: A service fraud would be a military fraud.

The Court: What do you mean by that?

Mr. Klafter: As distinguished from a civil action, in a military fraud you have something like desertion or leaving a post while on duty.

The Court: Would you say that this was a service fraud?

Mr. Klafter: A service fraud, yes, I would say that a service fraud would be taking money under false pretenses.

The Court: Just like any other fraud, but that is far from this case.

Mr. Klafter: The fact that he has taken military pay and accepted G. I. rights.

The Court: Now you are really stretching it, if he had gone in good faith, and you did not have his previous

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military record, then there was no fraud committed by him at all, and so far as taking military pay and accepting the G. I. bill of rights, don't you think the Army is trying to stretch this a little bit far when they are going into a case like this?

Mr. Klafter: No, sir.

The Court: You do not?

71 Mr. Klafter: No, sir, I sincerely mean that, the statute specifically argues that way. I would like to say this, I think every man in the Army who has been there for any length of time knows this, that is knows about this particular section from the Court Martial Manual.

The Court: Let us assume they know all about it. I still do not feel that that is the answer to my question as to whether or not you think the Army is going pretty far when they concern themselves with a case of this kind over twelve years old.

Mr. Klafter: It is the only way they can enforce discipline, if the Court please.

The Court: Well, it is almost eighteen years old now, and that is really going pretty far.

Mr. Klafter: Well, all I can do is to present the facts and argue the law.

The Court: Maybe that is the reason they have so many officers engaged in that kind of work, maybe that is the reason the tax payers are saying why all these court martials. There are a lot of other activities these men might be engaged in rather than carrying out cases like this which is almost nineteen years old. That is enough to shock most people when they even consider it.

72 Mr. Klafter: I might say that a man going in desertion would shock most people when they consider it.

The Court: I understand desertion in the military you make a distinction, that is, desertion in time of war and desertion in time of peace is two different things.

Mr. Klafter: This man went in desertion in 1943 in the height of the war from army infantry to a service battalion.

The Court: Then he came back and went into the Army?

Mr. Klafter: Was inducted in by force.

The Court: Went into the Army and served with an honorable record.

I do not think we need to go any further with the discussion on this matter.

This cause comes before us on a petition for a writ of

habeas corpus filed on behalf of the Relator and presents a definite clash between the Civil and Military Authorities, as to the rights of the citizens of this country.

Here is a man who is in the custody of the Officers of the United States Army out at Fort Sheridan and he comes into this Court and presents an authentic discharge from the Army of the United States dated June 28,
73 1946 showing that he honorably served his country in the Army and was properly discharged from the Army.

Just what authority the Army has now for his control is completely beyond me.

I think the law governing this matter is pretty well set forth in the Drainer case where it is stated:

"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service, and once honorably discharged such honorable discharge is a formal, final judgment passed by the Government upon the entire military record of the person."

That fits this situation.

The charge has been made here that back in 1930 there was something irregular so far as this man was concerned after he enlisted in the Army, but, that thereafter he surrendered to the Sheriff down in McLean County and the Army officers said they did not want him; and, thereafter, under some statute which has been quoted here—the authority of which has been questioned by the Relator—he is placed back in the Army and shipped out to Oregon and
74 there he walks away from that Army facility. Thereafter he is inducted in the Army and serves for the period 1944 until discharged in 1946.

The charge is now made by the Government, representing the Army, that this is a fraudulent discharge.

I do not understand that the Army, through their court-martial authority have any jurisdiction to pass upon a question which is purely a question of equity.

Let us supppose this discharge is fraudulent. Isn't this man entitled to his day in court? Isn't he entitled to come into a civil court and have tested out the question of whether or not the officers in the Army gave him a proper certificate of discharge?

To say that almost nineteen years after an enlistment which began down somewhere in the country here the Army or the United States can still be litigating with this gentleman as to whether or not he was authorized to walk

away from some military facilities in the far distant past is to me, as I said a while ago, just a shocking situation.

This relator is discharged.

Mr. Klafter: Pursuant to Rule 26 of the Court of
75 Appeals, I ask that the Relator be remanded to the custody of the Military until such time as we can perfect an appeal.

The Court: What rule is that?

Mr. Klafter: Rule 26.

The Court: Of what?

Mr. Klafter: Of the Court of Appeals.

The Court: I never heard of that rule, did you?

Mr. Bond: I am not familiar with it. I know that Judge Shaw let the other boy out.

The Court: Let us get the rule.

Mr. Klafter: Rule 26 of the Court of Appeals, shall I read it to you?

The Court: Yes.

Mr. Klafter: Rule 26:

"Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

"Pending a review discharging a writ of habeas corpus, after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance, with surety, as to the court, or judge,
76 rendering the decision may appear fitting in the circumstances of the particular case."

The Court: I am familiar with that rule, that is where we either enlarge on recognizance or place him back in custody whichever we choose. There is nothing there that makes it mandatory on us.

Mr. Klafter: No, there is nothing there that makes it mandatory on you.

The Court: The Relator may be discharged upon entering into a bond in the sum of one hundred dollars and he may sign his own bond.

(Which were all of the proceedings had on the hearing of the above-entitled matter.)

RELATOR'S EXHIBIT NO. 1.

Honorable Discharge

This is to certify that

WILLIAM H GIESE

36946911 SGT 746TH RY OPN. BN

Army of the United States

is Honorably Discharged from the military of the United States of America.

This certificate is awarded as a testimonial of Honest and faithful Service to this country.

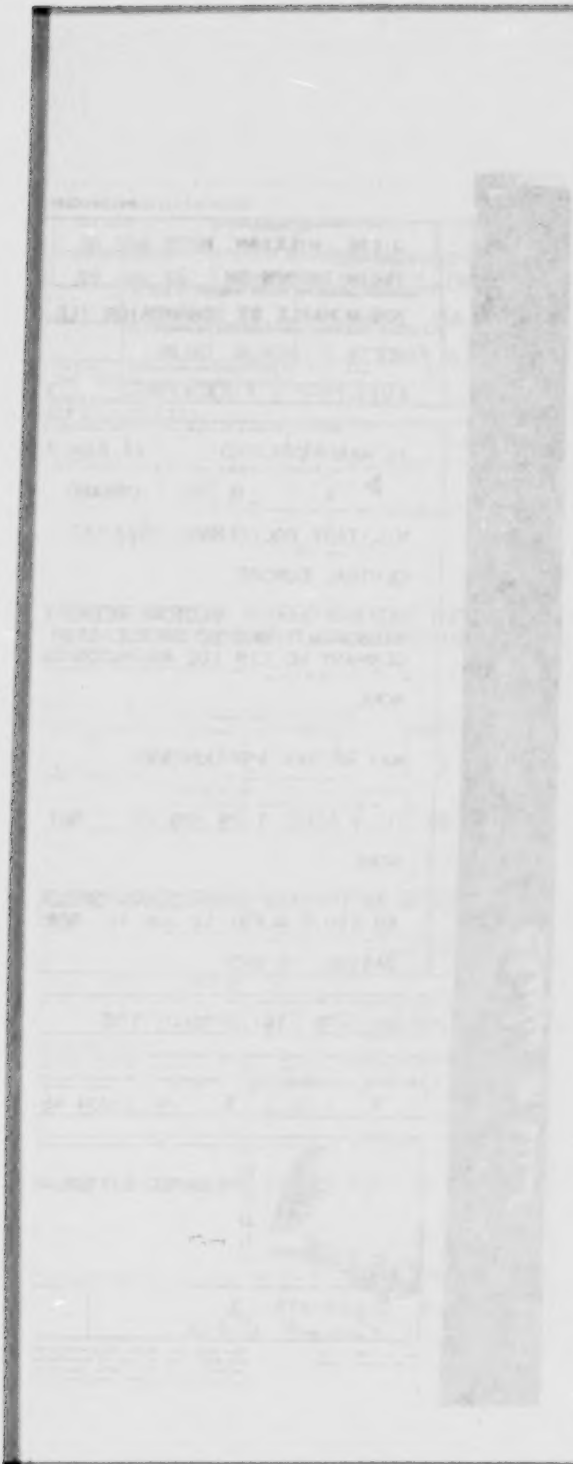
SEPARATION CENTER
FORT SHERIDAN ILLINOIS

29 JUNE 1946

C S Bender

C S BENDER
MAJOR FA

Acting Recorder of Deeds.



80 And on the same day, to wit, on the 16th day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following, entry, to wit:

81 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

This cause this day coming on for hearing on the Return to the Writ of Habeas Corpus herein come the parties to this suit by their attorneys, respectively, come also the respondents and bring into open court the body of the relator and the hearing proceeds and the Court having now heard the arguments of counsel and being fully advised in the premises, finds that the relator, William H. Giese, is illegally held in the custody of the respondents and it is therefore

Considered and Ordered by the Court that the relator, William H. Giese, be and he is hereby discharged from the custody of the respondents, S. J. Chamberlin, Fifth Army Commander, and Alexander H. Cummings, Fifth Army Commanding Officer, and that pending an appeal from this decision the relator is hereby enlarged upon his own recognizance in the sum of One Hundred Dollars ($100.00).

82 And on, to wit, the 8th day of February, 1950, came the Respondents by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal, in words and figures following, to wit:

83 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

United States of America, ex rel., William H. Giese, *Relator,* *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents.*	No. 49 C 1903.

NOTICE OF APPEAL.

The respondents, Lieut. General Steven J. Chamberlin and Colonel Alexander H. Cummings, hereby appeal to the United States Court of Appeals for the Seventh Circuit, from the order entered on December 16, 1949, by the United States District Court for the Northern District of Illinois, Eastern Division, discharging the relator.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois.

February 8, 1950.

(Certificate of Mailing Attached Hereto):

BLEED THROUGH POOR COPY

84 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 8, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Abner F. Bond
10 S. La Salle St.
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 8th day of February, A. D. 1950.

Roy H. Johnson,
Clerk,

By Gizella Butcher,
Deputy Clerk.

(Seal)

85 And afterwards on, to wit, the 14th day of February, 1950, came the Respondent, Colonel Alexander H. Cummings by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points on Appeal, in words and figures following, to wit:

86 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

RESPONDENT'S STATEMENT OF POINTS ON APPEAL.

Colonel Alexander H. Cummings, Respondent, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, will rely upon the following points on appeal:

1. The court erred in not discharging the Writ of Habeas Corpus.
2. The court erred in not dismissing the Writ of Habeas

Corpus and remanding the Relator to the custody of the respondent to be dealt with according to the laws of the United States of America.

3. The court erred in not finding that the United States Army had jurisdiction of the Relator.

4. The court erred in not finding that the Relator's enlistment on or about March 16, 1944 was fraudulent in that the Relator willfully misrepresented and concealed his qualifications at the time of the said enlistment as he did not reveal a former enlistment and desertion.

5. The court erred in finding that the Relator's discharge of June 24, 1946 was valid.

87 6. The court erred in finding that the Relator's discharge of June 24, 1946, was a valid discharge, and which discharge made all service prior to that date honorable, regardless of any fraud or wrongdoings theretofore perpetrated by the Relator during his entire military career.

7. The court erred in finding that the Relator's discharge of June 24, 1946, discharged him from his enlistment entered into on or about March 12, 1930.

8. The court erred in not finding that the United States Army had jurisdiction of the Relator after his discharge on June 24, 1946, for frauds perpetrated against the United States during the period of the Relator's former enlistment.

9. The court erred in not finding that the Relator should have first exhausted his remedies under the Army Court Martial System before pursuing his remedies in the United States District Court.

10. The court erred in not finding that the Relator's constitutional rights were not violated, and that he was accorded "due process of law" pursuant to the Constitution and the laws of the United States of America.

11. The court erred in not finding that the Relator deserted from the United States Army on or about the 15th day of March 1943, from his place of duty at Camp White, Oregon.

12. The court erred in not recognizing that on or about October 13, 1942, the Relator was properly returned to military control pursuant to the provisions of "Territorial Use of Army and Extension of Service Period Act", dated December 13, 1941; which Act automatically extended the enlistment of Army personnel for the duration of the war plus six months.

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13. The court erred in considering arguments preponded by the Relator which were beyond the scope of the Petition for the Writ of Habeas Corpus and the Respondent's Return.

88 14. The court erred in considering arguments preponded by the Relator which were contrary to the Respondent's Return and which were not traversed or otherwise denied by the Relator.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois.

89 And on the same day, to wit, the 14th day of February, 1950, came the United States of America by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

90 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

DESIGNATION OF RECORD.

The United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on appeal in this cause:

1. Petition for Writ of Habeas Corpus.
2. Jurat for Petition for Writ of Habeas Corpus.
3. Respondent's Return to the Writ of Habeas Corpus.
4. Order entered December 13, 1949 issuing Writ of Habeas Corpus.
5. Transcript of Proceedings had on the morning of December 16, 1949.
6. Transcript of Proceedings had on the afternoon of December 16, 1949.
7. Order entered December 16, 1949, discharging the Relator, and enlarged upon his own recognizance.
8. Notice of Appeal filed on February 8, 1950.
9. Respondent's Statement of Points on Appeal.

91 10. Designation of Record on Appeal.

Otto Kerner, Jr.,
United States Attorney for the Northern District of Illinois.

State of Illinois }
County of Cook } ss.

PROOF OF SERVICE.

William Sheahan, being duly sworn, deposes and says that he deposited a copy of the foregoing Designation of Record in the United States Mail Chute at the United States Court House in the City of Chicago, Cook County, Illinois, enclosed in a Government franked envelope plainly addressed to Abner F. Bond, 10 South LaSalle Street, Chicago, Illinois, this 14th day of February 1950.

William Sheahan.

Subscribed and sworn to before me this 14th day of February, A. D., 1950.

Anna L. Minahan,
Notary Public.

(Seal)

92 And afterwards on, to wit, the 15th day of February, 1950, came the Relator-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Names of Relator-Appellee and His Attorney of Record in words and figures following, to wit:

93 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

NAMES OF RELATOR-APPELLEE AND HIS ATTORNEY OF RECORD.

I hereby file, in accordance with Rule 10 (3) of the United States Court of Appeals, the name of the Relator-Appellee in the above-captioned matter: William H. Giese; and the name and address of the Relator-Appellee's attorney of record: Abner F. Bond, 10 South LaSalle Street, Chicago 3, Illinois.

Abner F. Bond,
Attorney for Relator-Appellee.

Attorney for Relator-Appellee:
Abner F. Bond
10 South LaSalle Street
Chicago 3, Illinois
STate 2-3872

BLEED THROUGH POOR COPY

94 And afterwards on, to wit, the 17th day of February, 1950, came the Relator-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Additional Designation of Record on Appeal in words and figures following, to wit:

95 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

RELATOR-APPELLEE'S ADDITIONAL DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Northern District of Illinois Eastern Division:

Now comes the Relator-Appellee, by his attorney, and pursuant to the Rules of Civil Procedure and hereby designates the following additional portion of the court proceedings and evidence to be contained in the record on appeal, to-wit:

Relator's Exhibit No. 1—a photostatic copy of honorable discharge issued to the Relator-Appellee by the Army of the United States.

Abner F. Bond,
Attorney for Relator-Appellee.

Attorney for Relator-Appellee:
Abner F. Bond
10 South LaSalle Street
STate 2-3872

Received a copy of the foregoing Relator-Appellee's Additional Designation of Record on Appeal this 17 day of February, 1950.

Otto Kerner, Jr., (by J. M.)
U. S. Attorney.

96 And afterwards, to wit, on the 20th day of February, 1950, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

97 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

The Court being fully advised in the premises, on motion of the respondents by the United States Attorney, it is

Ordered that the relator's Original Exhibit No. 1, being a photostatic copy of the Honorable Discharge of said relator, be incorporated in the Record on Appeal in this cause and transmitted to the United States Circuit Court of Appeals for the Seventh Circuit as part of the Transcript of Record on Appeal in lieu of a copy thereof.

98 United States of America }
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations filed in this Court in the cause entitled: United States of America, ex rel., William H. Giese, Relator, *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, et al., Respondents, No. 49 C 1903, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Relator's Original Exhibit 1 which is incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 17th day of March, 1950.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed May 22, 1950, in:

Cause No. 10143.

United States of America, *ex rel.*, William H. Giese,
Relator-Appellee,

vs.

Lieut. General Steven J. Chamberlin, Commanding General of Fifth Army, Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Ill.,
Respondents-Appellants.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, this 8th day of November, A. D. 1950.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand, nine hundred and forty-nine, and of our Independence the one hundred seventy-fourth:

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* 10143 *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit, on the twenty-first day of March, 1950, there was filed in the office of the Clerk of this Court an Appearance of counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Cause No. 10143.

U. S. A., *ex rel.*, William H. Giese,
Relator-Appellee,

vs.

Lieut. General Steven J. Chamberlin, etc., *et al.*, etc.,
Respondents-Appellants.

The Clerk will enter my appearance as counsel for Appellee.

Abner F. Bond,
10 South La Salle Street.

Endorsed: Filed Mar. 21, 1950. Kenneth J. Carrick, Clerk.

And afterwards, to-wit, on the twenty-fifth day of September, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Monday, September 25, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* 10143 *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel and on oral argument by Mr. John Peter Lulinski and Mr. Melvin L. Klafter, counsel for the appellant, and by Mr. Abner F. Bond, counsel for the appellee, and the Court takes this matter under advisement.

And afterward, to-wit, on the fifth day of October, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10143. October Term and Session, 1950.

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee*, *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 5, 1950.

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This is an appeal from an order entered by the district court on a petition for a writ of habeas corpus, discharging the relator, William H. Giese, from custody of the United States Army.

Relator enlisted in the United States Army about February 2, 1926, and was discharged February 1, 1929. He re-enlisted about March 12, 1930, for a period of three years, but deserted on July 2, 1930. Years later he was apprehended and was returned to military control in August, 1942, and pursuant to the Extension of Service Period Act of December 13, 1941 (55 Stat. 800), he was restored to duty on October 13, 1942, at Fort Sheridan for the duration of the war plus six months.

On or about March 15, 1943, relator again deserted. About one year later, on March 16, 1944, he was inducted into the service of the United States Army. On June 29, 1946, he was given an honorable discharge in the usual form. After an investigation by the Criminal Investigation Division of the Army, relator was placed under arrest in February of 1949 for desertion from the Army in March, 1943.

A general court martial was convened at headquarters, Fifth Army, in Chicago, Illinois, and the relator was tried and convicted of desertion under the 58th Article of War (10 U.S.C. 1530), and was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for three years.

Under established procedure the proceedings whereby relator was court martialed would be reviewed by the commanding general of the Fifth Army. Before he did so the relator filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. Before that court held the hearing on the petition the Commanding General announced as the result of his review that the sentence of confinement was reduced to ten months and the "dishonorable discharge" mitigated to a "bad conduct discharge." Thereafter a hearing was had in the district court, which granted the writ and discharged the petitioner, the relator herein, from custody of the Army.

Although it is the law in this circuit that in granting or denying a writ of habeas corpus the judge or court should make findings of fact and state conclusions of law (*Wood* v. *Howard*, 7 Cir., 157 F. 2d 807, 808; *Tucker, at al.* v. *Howard*, 177 F. 2d 494, 497), findings and conclusions were not entered herein. It is apparent, however, from the remarks of the judge at the hearing, that the basis of his action was that by issuing the honorable discharge to relator, he felt the Army had passed upon relator's entire military record.

Article of War 47 (10 U.S.C. 1518) provides in part:

> "(c) Action on record of trial.—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge

advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"(d) Approval.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: ***

Article of War 50(e) (10 U.S.C. 1521) provides in part:

"(e) Action by board of review in cases involving dishonorable or bad conduct discharges or confinement in penitentiary.—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, *** shall be examined by the Board of Review which shall take action as follows: ****"

Thus the district court assumed jurisdiction, granted the writ of habeas corpus, and discharged the relator before the record of the trial by court martial was acted upon by the reviewing authority and before the record was forwarded to the office of the Judge Advocate General for further appellate action.

Article of War 53 (10 U.S.C. 1525) became effective February 1, 1949,[1] and provides that any person con-

1. Article of War 53. Petition for new trial. Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct dis-

victed of an offense committed during the period of World War II has one year from the termination of the war, or within one year after final disposition of a case upon initial appellate review, whichever is later, to make his application.

Respondents point out that the provisions in the Manual for Courts Martial, prescribed by the President for the guidance of the Army, and the long established and consistent interpretation of Articles of War by the Army should have great weight with this court in deciding the issues before us, and cite the recent case of *Hiatt* v. *Brown*, 339 U.S. 103. The interpretation referred to is that an honorable discharge is a release from and terminates only a particular contract of enlistment; that an honorable discharge does not relieve a soldier from the consequences of a desertion committed during a prior enlistment. In the case at bar the honorable discharge certificate granted to the relator refers to the period of enlistment as March 16, 1944, to June 29, 1946.

The members of this court as well as those administering the affairs of the armed forces, and those directly interested in the outcome of this case, would prefer a decision on the issues herein on the merits. However, the question of jurisdiction has been directly raised, and it must be given first consideration.

Where, as here, habeas corpus constitutes a collateral attack upon a judgment, the general rule is that it may not be resorted to until after the exhaustion of other available remedies. *Ex Parte Hawk*, 321 U.S. 114; *Goto* v. *Lane*, 265 U. S. 393. The situation most often presented is that of a petitioner confined by State process

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charge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, that with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under Articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

who files an application for a writ of habeas corpus in a federal court without first having exhausted his State court remedies. *White* v. *Ragen*, 324 U.S. 760; 28 U.S.C. 2544. In recent months this court has repeatedly held that although a petitioner has exhausted all other State remedies, the remedy of habeas corpus is not available to him until he has also complied with the Illinois Post Conviction Remedies Act, Smith-Hurd Stats., 1949, Chap. 38, Sec. 826, which became effective August 4, 1949. *United States, ex rel. De Frates* v. *Ragen*, 181 F. 2d 1001; *United States, ex rel. Peters* v. *Ragen*, 178 F. 2d 377; *United States, ex rel. Hamby* v. *Ragen*, 178 F. 2d 379.

Before the district court would have jurisdiction to hear relator's petition for a writ of habeas corpus, he must first have exhausted his appellate remedies under Articles of War 47, 50 and 53, as hereinbefore set forth. It has been so held as to Article 53 in the Tenth Circuit in *McMahan* v. *Hunter*, 179 F. 2d 661, and in *Spencer* v. *Hunter*, 177 F. 2d 370; and in the Sixth Circuit in *Schilder* v. *Gusik*, 180 F. 2d 662[2]; and in the Fifth Circuit in *Whelchel* v. *McDonald*, 176 F. 2d 260[2], in *Hiatt* v. *Burchfield*, 179 F. 2d 679, in *Hiatt* v. *Fugate*, 179 F. 2d 679, in *Hiatt* v. *Jackson*, 179 F. 2d 680, the last three being per curiam opinions. Two district court cases in *Georgia* are to the same effect. *Sinclair* v. *Hiatt*, 86 F. Supp. 828; *Olsen* v. *Hiatt*, 89 F. Supp. 174.

In the case at bar the relator not only did not exhaust his last available military remedy provided in Article of War 53, but even filed his petition for writ of habeas corpus before the completion of the initial stages of the court martial review proceedings.

The order discharging relator from the custody of respondents is reversed, with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War.

REVERSED AND REMANDED.

2. The Supreme Court has granted certiorari in the Schilder and Whelchel cases, 339 U. S. 977.

And on the same day, to-wit, on the fifth day of October, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, October 5, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* vs. Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10143	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded.

And afterwards, to-wit, on the twenty-fifth day of October, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, October 25, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge.

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee*, vs. Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10143

On motion of counsel for the relator-appellee, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to the provisions of Rule 25 of the Rules of this Court.

And afterwards, to-wit, on the first day of November, 1950, there was filed in the office of the Clerk of this Court a designation for Supreme Court Record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 10143.

United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Michael L. Igoe, Presiding Judge.

DESIGNATION FOR SUPREME COURT RECORD.

Relator-Appellee will petition the Supreme Court of the United States for a Writ of Certiorari to review the judgment of this Court dated October 5, 1950, which is adverse to Relator-Appellee.

You will therefore please prepare and certify the following to the Supreme Court of the United States:

1. The entire printed transcript of record as filed in this Court on May 22, 1950.
2. Appearance of attorney for Relator-Appellee.
3. Hearing notes.
4. The opinion and judgment of this Court dated October 5, 1950.
5. Order re staying of mandate.

Abner F. Bond,
Attorney for Relator-Appellee.

Abner F. Bond,
10 South La Salle Street,
Chicago, Illinois.

Received a copy of the above Designation for Supreme Court Record.

Otto Kerner, Jr.,
U. S. Attorney.

Endorsed: Filed Nov. 1, 1950. Kenneth J. Carrick, Clerk.

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had, made in accordance with the designation of record, filed November 1, 1950, in:

Cause No. 10143.

United States of America, *ex rel.*, William H. Giese,
Relator-Appellee,

vs.

Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Ill.,
Respondents-Appellants,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 8th day of November, A. D. 1950.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

[fol. 62] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be and the same is hereby extended to and including March 3rd, 1951.

Sherman Minton, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of December, 1950.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 564

UNITED STATES OF AMERICA, ex rel. WILLIAM H. GIESE, Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, Commanding General of the Fifth Army, et al.

ORDER ALLOWING CERTIORARI—Filed April 9, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office - Supreme Court, U. S.
FEB 19 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. ~~564~~ 10

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALBERT E. HALLETT,
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Chicago 4, Illinois,
Attorney for Petitioner.

ABNER F. BOND,
ROBERT E. CLEVELAND,
Of Counsel.

THE BLAKELY PRINTING COMPANY, 350 WEST JACKSON, CHICAGO

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I. The issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that the relator "is Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) committed prior to such discharge; and, in failing to so hold, the decision of the Court of Appeals for the Seventh Circuit in this case is not only in conflict with the decision of the Ninth Circuit in the *Drainer* case but will, unless reversed by this Court, cause greatest concern on the part of millions of veterans holding such discharges 13-29

II. The relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50(e) and 53; and, in holding to the contrary, the Court of Appeals for the Seventh Circuit has in this case decided an important question of federal law which has not, in the recent *Whelchel, Gusik* or other cases been, but should be, authoritatively settled by this Court because of the effect of such a ruling upon the rights and privileges of millions of veterans holding such discharges. 29-34

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

Petitioner.

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner William H. Giese, hereinafter sometimes called "relator," prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 5, 1950, which judgment reversed an order discharging the relator on a writ of habeas corpus, and remanded the case to the District Court with instructions to dismiss the petition, to discharge the writ and to remand the relator to the respondents' custody, without prejudice to his filing a new application for such a writ after exhausting certain administrative remedies under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525).

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 53-57) is reported at 184 F. 2d 404.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 5, 1950 (R. 58). On December 28, 1950, the time within which this petition could be filed was extended by Mr. Justice Minton of this Court to and including March 3, 1951.

The jurisdiction of this Court is invoked under the provisions of Sections 1254 and 2101 of the Judicial Code, as revised by the Act of June 25, 1948 (28 U. S. C. A. §§ 1254, 2101).

THE QUESTIONS PRESENTED.

1. Whether the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that a certain Army enlisted man "is hereby Honorably Discharged from the military service of the United States" constitutes a "formal, final judgment passed by the Government upon his entire military record", discharges him from all subsisting enlistments and makes him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge.

2. Assuming an affirmative answer to the foregoing,—whether such an individual, subsequently convicted by court-

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martial of an offense (desertion) not so excepted, must, despite his civilian status and before seeking his release on a writ of habeas corpus, first "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53.

3. A third question, reserved for possible argument upon the merits if this petition be granted,—whether the relator, who had reenlisted for 3 years in 1930 and had been involuntarily "restored to duty" in 1942, supposedly under the Extension of Service Act of 1941, was actually subject to Army control at the time of his alleged desertion in 1943.

THE STATUTES INVOLVED.

The various statutes involved are set forth in the Appendix.

SUMMARY STATEMENT.

The relator enlisted in the United States Army in February of 1926 for three years and was discharged upon the termination of such enlistment in February of 1929 (R. 7). In March of 1930, he re-enlisted in the Army for another three years but on July 2 of that year went absent without leave at Fort Snelling, Minnesota (R. 2, 3, 7). In 1935 or 1936, he tendered himself as a deserter to the Sheriff at Bloomington, Illinois, who contacted the F. B. I. or the Army but he was apparently not wanted by them and was released (R. 3, denied R. 7). In July or August of 1942, he was apprehended and returned to military control at Fort Sheridan, Illinois (R. 3, 7, 9). On October 13, 1942, supposedly pursuant to the Extension of Service Act of 1941 (the applicability and effect of which are disputed), he was "restored to duty" and on October 29, 1942, was transferred to Camp White, Oregon, where, on March 15, 1943, he again went absent without leave (R. 7, 9). On March 16, 1944, he was inducted (drafted) into the Army under the same name, William H. Giese (R. 3, 7, 33). After serving 21 months overseas and having been awarded the Good Conduct, Occupation and Victory medals and the European, African and Middle Eastern theatre ribbons with Bronze Battle Star (R. 39-40), he was "honorably discharged from the military service of the United States" on June 29, 1946, at Fort Sheridan, Illinois, for the "convenience of the Government" (Demobilization) as a Sergeant (R. 3, 7, 39-40). In July of 1948, he was arrested by the Criminal Investigation Division of the Army but was granted partial liberty on the condition that he report to them twice a week (R. 3, 6). In February of 1949, he was again arrested and confined in the Guard House at Fort

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Sheridan, Illinois (R. 3, 6). Subsequently (in June and July, 1949) he was tried by a general court-martial convened by the Commanding General of the Fifth Army at Chicago, Illinois, convicted of a desertion alleged to have been committed by him on or about March 15, 1943, and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years (R. 7). Subsequently the respondent Commanding General of the Fifth Army, as the "convening authority" (under Article of War 47, 10 U. S. C. 1518), presumably after referring the case to his staff judge advocate, acted upon the record of his trial and reduced so much of the sentence as pertained to confinement to 10 months and mitigated the "dishonorable discharge" to a "bad conduct discharge" (R. 7).

On December 13, 1949, the relator filed a petition for a writ of habeas corpus in the United States District Court at Chicago, Illinois (R. 2-4). On December 16, 1949 the respondents filed their return to the writ (R. 6-9), a hearing was held (R. 10-38) and the District Court found that the relator was being illegally held and ordered him discharged from the respondents' custody (R. 41), the District Court apparently taking the view that the issuance, "for the convenience of the Government (Demobilization)," on June 29, 1946, of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record," discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge, following the rule laid down in **Ex Parte Drainer**, 65 F. Supp. 410 (1946), affirmed, *per curiam, sub nom* **Gould v. Drainer**, 158 F. 2d 981 (1947). On the Government's

appeal, the Court of Appeals, on October 5, 1950, without reaching the merits, reversed the order discharging the relator and remanded the case to the District Court with instructions to dismiss the petition, to discharge the writ and to remand the relator to the respondents' custody, without prejudice to his filing a new application for a writ after exhausting his administrative remedies under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525) (R. 53-58).

As above indicated, all "administrative" action under Article of War 47 had been completed prior to the hearing in the District Court and, in view of the automatic character of the review provided by Article of War 50 (10 U. S. C. 1521), it must be *presumed* (as is the fact) that the record of trial in this case has long since been reviewed, under subparagraph (e) of said AW 50, by a Board of Review in the office of the Judge Advocate General; that such record of his trial has long since there been held legally sufficient to support the court-martial's findings and sentence; and that the relator's sentence as earlier mitigated (to 10 months' confinement and a bad conduct discharge) has long since there been approved and transmitted to the convening authority (the respondent Chamberlain) for execution (when, as and if the relator is returned to the respondents' custody). Hence, even were they applicable to him as a civilian (which is disputed), the relator has already exhausted any possible "administrative remedies" under Articles of War 47 and 50 (e). In view of the provision of Article of War 53 (10 U. S. C. 1525) that the Judge Advocate General may, under this section, grant a new trial, vacate a sentence, etc., only "*upon application of an accused person,*" it must also be *presumed* (as is the fact) that no such "application" has as yet been made by the relator; and, in view of the further provision of said AW 53 that, as to cases involving offenses

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committed during World War II, such an "application" may be made "within one year after termination of the war" and the further fact that said World War II has not as yet been declared "terminated" by the President, it must also be *presumed* (as is the fact) that if, contrary to our contentions, such provision be held by this Court to be applicable to civilians (viz: individuals given "honorable discharges" prior to their trial by courts-martial), then the time within which he may file such an "application" with the Judge Advocate General has not as yet expired.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Seventh Circuit erred:

1. In **failing to affirm** the order of the trial court discharging the relator from the custody of the respondents.

2. In **failing to hold** that the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge.

3. In **failing to hold** that the relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53.

4. In **holding** that the relator (despite his contention that he was a civilian, no longer subject to trial by court-martial for a desertion alleged to have been committed prior to his discharge) must, before seeking his release on a writ of habeas corpus, first exhaust such administrative remedies as may be available to military personnel, under Articles of War 47, 50 (e) and 53.

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5. In **reversing** the order discharging the relator on a writ of habeas corpus **and** in **remanding** the case to the District Court **with instructions** to dismiss the relator's petition for a writ of habeas corpus, to discharge said writ and to remand the relator to the custody of the respondents, without prejudice to his right to file a new application for such a writ after exhausting certain indicated administrative remedies under Articles of War 47, 50 (e) and 53.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES" CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

Each of the foregoing reasons for the allowance of the writ is fully developed in the appended brief in support of this petition.

CONCLUSION.

For the foregoing reasons, the petitioner respectfully submits that this case presents a situation of such importance, not only to him as an individual but to the millions of present and future veterans, as to call for the exercise by this Court, in its sound judicial discretion, of its power to review the decision of the court below and he therefore prays that a writ of certiorari to the Court of Appeals for the Seventh Circuit be allowed in this case, and that, on

such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

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BRIEF IN SUPPORT.

In order to avoid unnecessary repetition, the foregoing petition for the writ is hereby by reference incorporated into this supporting brief.

ARGUMENT.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES" CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

This proposition is not a new one.

In **United States ex rel. Santantonio v. Warden,** 265 F. 787 (D. C. E. D. N. Y. 1919), the relator enlisted in the U. S. naval reserve as a chief boatswain's mate in May of 1917 for 4 years. In 1918, while on active duty, he was arrested and confined pending an investigation into charges that he had accepted a bribe, but was restored to duty. In April of 1919 he was released from active duty, placed on the inactive list and given a certificate certifying that he "had performed honorable service" from the time of his enlistment to the date of his release from active service. In November of 1919 he was arrested and held for trial by court-martial on charges of accepting a bribe in 1918.

In *sustaining the writ and discharging the relator, even before trial,* the Court, at pages 789-790, said:

> "The question here presented for answer is: Can an enlisted man in the United States Naval Reserve Forces be tried by a navy court-martial for an offense alleged to have been committed while in active service, and be amenable to a court-martial after he has been released from actual service and entered civil life; no charges or specifications of charges having been preferred against him prior to his release from active service?
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> * * * * *
>
> **"So the conclusion is imperative that the naval authorities lost jurisdiction of the person of the relator** on January 15, 1919, when he was 'released and restored to duty,' and that if jurisdiction still existed, by virtue of the fact that he was still on active duty, then jurisdiction was completely lost on April 9, 1919, **when he was discharged from active service."** (Emphasis supplied.)

In **United States ex rel. Viscardi v. MacDonald,** 265 F. 695 (D. C. E. D. N. Y., 1920), the relator enlisted in the U. S. naval reserve in 1917 for 4 years and, while on active duty in 1918, was taken into custody for attempting to bribe a chief boatswain's mate unlawfully to transfer a

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seaman from sea to shore duty, but was restored to duty, and served until July of 1919, when he was released from active duty and given a certificate which was equivalent to an honorable discharge, except that in time of war or national emergency he could "be required to perform active service in the navy throughout the war or until the national emergency ceases to exist." Subsequently he was recalled to active duty and held for trial by court-martial for such attempted bribery in 1918.

In *sustaining a writ of habeas corpus, even before trial by court-martial, and in discharging the relator,* the Court, at pages 697-699, said:

> "The Attorney General, in an exhaustive opinion dated July 10, 1919, has held that **a person discharged from the** naval **service,** either in the United States navy or the United States naval reserve force, **cannot be brought to trial before a** naval **general court-martial,** or otherwise punished, **for an offense (committed during active service) after he has been discharged** from the navy or released **from active duty** therein and within two years after the date of the commission of such offense. All decided cases, so far as known, are recited in this opinion.
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> * * * * *
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> "In two cases recently decided in this district the relator was subject to trial by court-martial during the time within which he was still on active duty, and after being freed from preliminary arrest pending inquiry; but no such court-martial was instituted until after release from active duty with the navy.
>
> "In the case of *United States ex rel. Santantonio* v. *Warden or Keeper of Naval Prison,* 265 Fed. 787, the relator obtained by habeas corpus his release from court-martial at the hands of the navy for an offense alleged to have been committed during active service. The court held his release from active service equivalent, so far as the charges of misconduct were concerned, to an honorable discharge before arrest on court-martial. The arrest of the relator occurred

within the four-year period for which he had enlisted as a member of the volunteer naval reserve; but he had not been recalled into active duty, and was in effect a civilian subject to recall into active service only 'in time of war or national emergency.' Decision by Thomas, J., November 26, 1919.

"In the case of *United States ex rel. Goodrich* v. *MacDonald*, no written opinion (decision by Manton, C. J., sitting in the District Court, February 25, 1920), the relator was discharged because he had been released from active duty in the navy, with a certificate equivalent in these respects to an honorable discharge, prior to the time when an attempt was made to recall him into active service, for the purpose of trial by court-martial, and then to place him on trial as if no discharge had been granted.

* * * * *

"These decisions in effect hold that the release from active duty is equivalent to an honorable discharge, after which a man cannot be recalled into service, except upon the intervention of some actual continuation of service in time of war or of national emergency. They also hold, in accordance with the opinion of the Attorney General, *supra*, that after such release a member of the naval reserve force cannot be brought to trial by court-martial for an offense alleged to have been committed prior to his release. They also hold that the charge for which the relator, Viscardi, is now held on court-martial, is not within the provisions of chapter 67 of the Laws of 1863 (12 Stat. 696), entitled 'An act to prevent and punish frauds upon the government of the United States,' by section 2 of which law it is enacted:

> " 'That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sen-

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tence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.'

"Giving full effect to these decisions, therefore, and recognizing the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces, the present writ of habeas corpus should be sustained, and the relator discharged." (Emphasis supplied.)

In **Ex parte Wilson**, 33 F. 2d 215 (1929), an ensign in the U. S. Navy went absent without leave on October 13, 1927 and, on January 26, 1928, on the recommendation of the Secretary of the Navy, the President directed that he "be dropped from the rolls of the Navy." On February 18, 1929, he was apprehended and held for court-martial for desertion. In *discharging the relator from custody, even before his court-martial*, Judge Groner, at page 215, said:

"It was stated at bar that the precise question here involved has never been judicially determined. On the other hand, **it has been uniformly and consistently held by the administrative officers of the Army and Navy that a person separated from either service thereafter ceases to be amenable to military jurisdiction**, and this practice has been approved by separate opinions of five Attorneys General—Toucey (5 Op. Attys. Gen. 55), Cushing (8 Op. Attys. Gen. 328), Knox (24 Op. Attys. Gen. 570), and Palmer (31 Op. Attys. Gen. 520).

"These opinions are largely based upon the recognition of the fact that a court martial under the laws of the United States is a court of special and limited jurisdiction. It has no jurisdiction beyond that given it by statute, and, since there is no statute giving it jurisdiction over persons not in the military service, it may not assume such jurisdiction either as a matter of convenience or public policy.

* * * * *

"* * * Under such circumstances, to say that, though he is dropped, he is not dismissed, is a play on words, but, whether dropped or dismissed, he is out of the service, and his place filled by another, and **the person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil courts for relief from arrest and trial by a Navy court-martial.**" (Emphasis supplied.)

As is pointed out in our Summary Statement (*ante*, pp. 5-6), the District Court found that the relator was being illegally held and ordered him discharged from the respondents' custody (R. 41), the District Court apparently taking the view that the issuance, "for the convenience of the Government (Demobilization)", on June 29, 1946, of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge, following the rule laid down in **Ex Parte Drainer**, 65 F. Supp. 410 (1946), affirmed, *per curiam, sub nom* **Gould v. Drainer**, 158 F. (2d) 981 (1947).

In the cited case, which, after changing "Drainer" to "Giese" and "Navy" to "Army", seems to be on all fours with the case at bar, the relator enlisted in the U. S. Marine Corps (which is not a separate branch of service but is a part of the U. S. Navy and subject to its laws and regulations) in August of 1940 for four years. A month later he absented himself without leave and was declared a deserter. In July of 1943 he enlisted in the U. S. Navy under the same name but did not disclose his prior service.

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After serving a year and a half, eight months of it overseas, he was given an "honorable medical discharge" by the Navy in November of 1944. In November of 1945 he was apprehended, returned to a Navy base, tried and found guilty of a desertion alleged to have been committed on September 8, 1940 and was sentenced to be dishonorably discharged and to be confined at hard labor for eighteen months.

In *granting the petition for a writ of habeas corpus and in discharging the relator*, Judge Roche, at pages 411-412 (of 65 F. Supp.), said:

> "* * * In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service. **While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.**
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> * * * * *
>
> **"The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to the receipt of an Honorable Discharge.**
>
> **"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service.** *United States* v. *McDonald*, 265 F. 695; Naval Courts and Boards, Section 334 at page 92; Winthrop, Military Law and Precedents, 2nd Ed. (1920) at page 89. **And once honorably discharged, such Honorable Discharge is a 'formal final judgment passed by the government upon the entire military record' of the person. United States v. Kelly**, 15 Wall. 34, 82 U. S. 34, 36, 21 L. Ed. 106." (Emphasis supplied.)

As pointed out above, Judge Roche's said order was *affirmed per curiam sub nom* **Gould v. Drainer**, 158 F.

2d 981, by the Ninth Circuit in 1947, and was expressly cited and followed by the District Court in deciding the case at bar (R. 37).

The *Drainer* case has since been cited with approval in **United States ex rel. Pasela v. Fenno**, 76 F. Supp. 203 (1947), affirmed, 167 F. 2d 593, cer. allowed, 334 U. S. 857, cer. dismissed, 335 U. S. 806, where the District Court, in holding a Navy Fleet Reservist subject to court-martial on charges growing out of his thefts of Naval property, at page 205, said:

> "The Courts have held that one discharged from the services, including the Navy, as well as a reservist of the Army returned to inactive status, is not ordinarily subject to recall to active duty for trial for offenses committed, but not prosecuted, during the prior active service.[2] It would appear that such a recall has been provided for, however, in cases of fraud,[3] and in recent years for all offenses committed by Naval Reservists."

Another example of a proper application of Article of War 94 (10 U. S. C. 1566) is **Kronberg v. White**, 84 F. Supp. 392 (1949), where, in a suit by the guardian of a minor against certain Army officers for his ward's allegedly false arrest and imprisonment, the Court dismissed the suit on the ground that an honorably discharged veteran could legally be arrested and tried by court-martial for the theft of some $700 worth of Government property under said Article of War 94 which expressly provides for such action

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"2 *United States ex rel. Hirschberger* v. *Malanaphy*, D.C.E.D. N.Y., 1947, 73 F. Supp. 990; *Durant* v. *Hironimus*, D.C.W.Va., 1947, 73 F. Supp. 79; *United States ex rel. Viscondi* v. *MacDonald*, D.C.E.D.N.Y., 1920, 265 F. 695; *United States ex rel. Santantonio* v. *Warden*, D.C.E.D.N.Y. 1919, 265 F. 787; *Ex parte Drainer*, D.C.N.D.Cal., 1946, 65 F. Supp. 410, affirmed 9 Cir. 1947, 158 F. 2d 981; *Ex parte Wilson*, D.C.E.D.Va., 1929, 33 F. 2d 214.

"3 34 U.S.C.A. § 1200, Art. 14, par. 11."

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in cases of specified frauds against the Government, the Court, at 394, saying:

> "Jurisdiction is the critical issue and its depends, in the first instance, on the constitutionality of Article 94. It is undisputed that plaintiff had served in the Army, had been honorably discharged, and was a civilian at the time of his arrest. It is further undisputed that he was not subjected to military arrest and imprisonment until after investigation had disclosed a substantial quantity of Government property in his possession, together with letters indicating strongly that such property had been either illegally obtained while he was in the service or illegally retained after his discharge. He therefore came squarely within the provision of Article 94 that makes the discharged soldier who is guilty of defrauding the Government liable to military arrest and court-martial in the same manner and to the same extent as if he had not been separated from the service. * * *"

It should especially be noted that, in the case now at bar, the relator was *not* charged with any violation of Article of War 94 (10 U. S. C. 1566) but was charged only with desertion under Article of War 58 (10 U. S. C. 1530), which is *not* one of the pecuniary frauds against the Government specifically enumerated under said Article of War 94 which expressly provides that a person so defrauding the Government (which is not even charged here)

> "shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom."

The *Drainer* case has also been cited with approval in **Hironimus v. Durant**, 168 F. 2d 288 (C. C. A. 4th, 1948, Cer. den. 335 U. S. 818), where (in holding that a WAC Captain who had been issued orders putting her on "ter-

minal leave," upon the expiration of which she would be relieved from active duty, although her commission would continue in force "during the period of the present emergency plus 6 months unless sooner terminated," which orders were terminated and revoked *before* her "terminal leave" had expired, could legally be ordered back to active duty and tried by court-martial for larceny committed during her service) the Court of Appeals for the Fourth Circuit, at page 293, said:

> "* * * **Thus it has been held that a person discharged from the Navy or the Army before the commencement of a court-martial prosecution against him cannot thereafter be brought to trial before the court-martial for crimes committed while he was in active service except as to certain offenses for which the statute makes express provision**; and it has also been held that an officer in inactive status cannot be restored to active duty so as to subject him to such prosecution. 31 Op. Atty. General 521; Manual for Courts-Martial, United States Army, p. 8, par. 10; 4 JAG Bull. 35, 1946; *United States* v. *MacDonald*, D. C. E. D. N. Y., 265 F. 695; *United States* v. *Warden*, D. C. E. D. N. Y., 265 F. 787; *Ex parte Wilson*, D. C. E. D. Va., 33 F. 2d 214; *Ex parte Drainer*, D. C. N. D. Cal., 65 F. Supp. 410, affirmed *Gould* v. *Drainer*, 9 Cir., 158 F. 2d 981. Cf. *United States* v. *Malanaphy*, D. C. E. D. N. Y., 73 F. Supp. 990, reversed April 9, 1948, 2 Cir., 168 F. 2d 503." (Emphasis supplied.)

The *Drainer* case has also been cited with approval by the Court of Appeals for the Second Circuit in **United States ex rel. Hirshberg v. Malanaphy**, 168 F. 2d 503 (1948), reversed (on other grounds) *sub nom.* **United States ex rel. Hirshberg v. Cooke**, 336 U. S. 210, 69 S. Ct. 530 (1949). In that case the relator in March of 1946 was given an honorable discharge from the Navy but, the next day, reenlisted, obligating himself to serve another four years

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"subject to such laws, regulations and articles for the government of the Navy as are or shall be established by the Congress * * * or other competent authority * * *." A year later he was charged with mistreating other Naval enlisted men while a Japanese prisoner of war, convicted by a court-martial and sentenced to ten months confinement and to be dishonorably discharged from the Navy. He then sought his release on a writ of habeas corpus on the ground that the court-martial judgment was void for want of statutory power to convict him for an offense committed, if at all, during his prior enlistment, and the District Court sustained his contention and released him from custody. 73 F. Supp. 990. The Court of Appeals for the Second Circuit, one Judge dissenting, reversed, 168 F. 2d 503, on the ground that, under Naval Regulation 334 issued by the Secretary of the Navy and approved by the President and under the relator's reenlistment contract above quoted, the Navy had jurisdiction to try him while on duty despite his prior "honorable discharge" but, at page 505, conceded that:

> "* * * **It has long been the rule that a member of the Navy or the Army who has received an honorable discharge from service and has been returned to civilian life cannot be tried by court-martial for offenses committed during his enlistment, excepting such offenses as are specifically withdrawn from the general rule by Article 14** of the Articles for the Government of the Navy, 34 U. S. C. A. § 1200, Art. 14 **or Article 94 of the Articles of War**, 10 U. S. C. A. § 1566, Art. 94.[2]. **The offenses of which the relator was convicted were not of those specified in Article 14.** And a subsequent enlistment, no matter how soon after the discharges,

"2 See *Ex parte Wilson*, D.C.E.D.Va., 33 F. 2d 214; *Ex parte Drainer*, D.C.N.D.Cal., 65 F. Supp. 410, 411, affirmed *sub nom Gould* v. *Drainer*, 9 Cir., 158 F. 2d 981; *United States ex rel. Viscardi* v. *MacDonald*, D.C.E.D.N.Y., 265 F. 695, 697; *Durant* v. *Hironimus*, D.C.S.D.W.Va., 73 F. Supp. 79, 85."

does not revive the last jurisdiction. See Winthrop, Military Law and Precedents, 1920 ed., 93; CMO 22-1917, page 7; CMO 12-1921, page 11; CMO 1-1926, page 9; CMO 12-1929, page 7. These rulings would be conclusive against the jurisdiction of the court-martial in the case at bar, were it not for section 334, Naval Courts and Boards. * * *" (Emphasis supplied.)

On certiorari, this Court, in 336 U. S. 210, 69 S. Ct. 530 (1949), *reversed* and, speaking through Mr. Justice Black, at pages 214-219, said:

"While not itself determinative of the question here, 34 U. S. C. § 1200, art. 14 (Eleventh), 34 U. S. C. A. § 1200, art 14, subd. 11, has greatly influenced the Army and Navy in determining their court-martial jurisdiction to try service personnel for offenses committed in prior enlistments. That Article provides that where any person previously discharged or dismissed from the Navy has 'while in the naval service' been guilty of certain types of fraud against the Government, such person 'shall continue to be liable, to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.'

"Article 14 (Eleventh) stems from an Act of Congress passed in 1863, particularly designed to punish frauds against the military branches of the Government in connection with the procurement of supplies for war activities. 12 Stat. 696. That the attention of the 1863 Congress was directly focused upon the powers that could and should be vested in courts-martial is made clear by the debates and by the fact that Congress deleted from the bill as proposed specific provisions which would have made civilian government contractors subject to trial before military and naval courts-martial. Cong. Globe, 37th Cong., 3d Sess. 952-958 (1863), and Part II, Appendix to Cong. Globe, 3d Sess. 199 (1863). See *Ex parte Hen-*

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derson, C. C. D. Ky. 1878, 11 Fed. Cas. 1067, No. 6,349. And see *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 539-545, 63 S. Ct. 379, 382-385, 87 L. Ed. 443. But after elimination of certain provisions which would further have expanded court-martial jurisdiction, Congress left in the bill § 3, now Naval Article 14 (Eleventh), which makes naval personnel guilty of service frauds subject to court-martial after discharge or dismissal. The same 1863 provision has also been made applicable to Army personnel by Article of War 94, 10 U. S. C. § 1566, 10 U. S. C. A. § 1566.

"**Congress in this 1863 Act plainly recognized that there was a significant difference between court-martial power to try men in the service and to try former service men after their discharge.** The Government correctly argues that the attention of the 1863 Congress was not focused on the precise question here, namely, the extent of a military court's statutory power to punish a man presently 'in the service' for an offense committed in a prior enlistment period from which he has been discharged. **But the fact remains that the 1863 Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service. Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined—frauds against the Government. Since the 1863 Act, Congress has not passed any measure that directly expanded court-martial powers over discharged servicemen, whether they re-enlisted or not.**

"Obviously Article 8 (Second), which subjects to court-martial jurisdiction persons 'in the Navy', supports an argument that petitioner was subject to trial by this court-martial. It is equally obvious that the language of Article 8 (Second) particularly in view of Article 14 (Eleventh) supports an argument that this court-martial could not try petitioner for an offense committed prior to his honorable discharge. Under

these circumstances the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great weight in interpreting the Articles.

"The question of the jurisdiction of a naval court-martial over discharged personnel was submitted by the Secretary of the Navy to the Attorney General in 1919. The precise question of whether re-enlistment could revive jurisdiction of a military court was not considered, but as to the power of military courts over discharged personnel in general the **Attorney General reached the conclusion that a person discharged from the Navy before proceedings were instituted against him 'for violations of the Articles Governing the Navy, excepting Article 14' could not 'thereafter be brought to trial * * * for such violations, though committed while he was in the service.'** 31 Op. Atty. Gen. 521, 529. **This conclusion of the Attorney General relied on statements of the Judge Advocate Generals of the Army and Navy that their offices had 'from the beginning and uniformly held that a person separated from service ceases to be amenable' to military and naval jurisdiction.** Previous to the Attorney General's 1919 opinion neither the Navy nor Army had ever claimed court-martial power to try their personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before discharge. See Winthrop, Military Law and Precedents, 93 (2d ed. 1920). **The Government concedes that the Army has always so construed its court-martial jurisdiction whenever the question arose.** And the Government concedes that the Navy also followed this view of its jurisdiction until 1932. Many holdings and opinions of Army and Navy authorities are cited to support these concessions. The Government's brief quotes the following language by the Navy Department in one of the cases which considered the precise issue raised here. The case appears in CMO 12-1921, p. 11.

"'**Except in cases of offenses in violation of Article 14 of the Articles for the Government of**

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the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted.'

"Accepting as we do the longstanding Army and Navy interpretation of the Articles previously referred to, an interpretation which necessarily would deny jurisdiction to the court-martial here, there remains the contention that the Navy has, by a recent congressionally authorized regulation acquired such jurisdiction for its courts-martial. 34 U. S. C. § 591, 34 U. S. C. A. § 591, authorized the Secretary of the Navy, with the approval of the President, to adopt and alter regulations and orders for control of the Navy. The Government claims that a regulation adopted pursuant to this authority has been promulgated, and that it vested the necessary power in this court-martial to try petitioner. This authorized regulation, it is contended, had the force of law, *Ex parte Reed*, 100 U. S. 13, 22, 25 L. Ed. 538, and consequently supplants the prior statutes which, as interpreted, had denied the jurisdiction here asserted. There has been considerable argument as to whether the language of the Navy regulation was sufficiently precise to endow it with the force of law. Passing over this argument, however, we are not able to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U. S. C. § 591, 34 U. S. C. A. § 591, as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. *United States* v. *Symonds*, 120 U. S. 46, 50, 49, 7 S. Ct. 411, 412, 413, 30 L. Ed. 557.

"The regulation stands no better if it be considered merely as an evidence of a revised naval interpretation of the Article. This revised naval interpretation was

given in 1932. **Before that time, both Army and Navy had for more than half a century acted on the implicit assumption that discharged service men, whether re-enlisted or not, were no longer subject to court-martial power. The Attorney General of the United States had proceeded on the same assumption. And see United States v. Kelly,** 15 Wall. 34, 36, 21 L. Ed. 106. Under these circumstances, little weight can be given to the 1932 separate effort of the Navy to change the long-accepted understanding of its statutory court-martial power. For should this belated naval interpretation of its statutory court-martial powers be accepted as correct, there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. **We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces."** (Emphasis supplied.)

In view of the foregoing, we respectfully submit (1) that the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) committed prior to such discharge; and (2) that, in failing to so hold, the decision of the Court of Appeals for the Seventh Circuit in this case is not only in conflict

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with the decision of the Ninth Circuit in the *Drainer* case but will, unless reversed by this Court, cause greatest concern on the part of millions of veterans holding such discharges.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

In the **Santantonio** (265 F. 287), **Viscardi** (265 F. 695) and **Wilson** (33 F. 2d 695) cases, heretofore discussed in detail under Point I (*ante*, pp. 14-18), the courts have held that (except for those pecuniary frauds against the Government specifically enumerated under Article of War 94) the effect of the issuance of an "honorable discharge" to a serviceman is to transform him into a "civilian", no longer subject to trial by courts-martial; and, as a result,

in each of said three cases, the court discharged the relator from custody on a writ of habeas corpus, not only *without* requiring him first to exhaust any post conviction "administrative remedies" but *without* requiring him even to stand trial before a court-martial, the court in the *second* **(Viscardi)** case expressly

> "recognizing the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and the court in the *third* **(Wilson)** case expressly holding that

> "the person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil courts for relief from arrest and trial by a * * * court-martial".

Furthermore, in the **Hirshberg** (336 U. S. 210) case, also discussed in detail under Point I (*ante*, pp. 22-28), this Court, in *reversing* the Second Circuit and in thus *discharging* the relator, who had received an "honorable discharge" prior to his trial by court-martial, likewise did *not* require the relator (as such a civilian) first to exhaust any post conviction "administrative remedies" before seeking his release on a writ of habeas corpus.

As your Honors well know, this Court has recently (December 4, 1950) decided **two** cases **(Whelchel v. McDonald**; and **Gusik v. Schilder)** dealing with this general subject matter but *neither* of those cases involved a veteran who had received an "honorable discharge" prior to his trial by court-martial; and in *neither* of said cases did this Court pass upon or even discuss the precise issue now raised by the instant petition for a writ of certiorari.

In the **first** of these two cases, **Whelchel v. McDonald**, No. 109 of this Term, 340 U. S. ____, 71 S. Ct. 146, the

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relator, while on active duty with the United States Army in Germany, was convicted of rape upon a German girl and was given a (mitigated) sentence to ten years confinement. He sought his release on a writ of habeas corpus on the grounds: (1) that question of his sanity was not properly determined; (2) that the law member of a court-martial was not named from the Judge Advocate General's Department; and (3) that there was no enlisted men on the court-martial. The District Court denied the petition and the Fifth Circuit, after holding the case while the relator applied unsuccessfully for a new trial under Article of War 53, affirmed (176 F. 2d 260; 178 F. 2d 760). Although the Court of Appeals pointed out that, at the time of its original opinion (176 F. 2d 260), the relator had not exhausted his administrative remedies by seeking a new trial under Article of War 53, this Court, after noting that such an application had been made *before* the case *left* the Court of Appeals, affirmed but did *not* further discuss the question.

In the **second** of these two cases, **Gusik v. Schilder**, No. 110 of this Term, 340 U. S. ____, 71 S. Ct. 149, the relator, while on active duty with the United States Army in Italy, was tried by a general court-martial and convicted of murder. After exhausting such administrative remedies as were available under the Articles of War as they then existed, he sought his release on a writ of habeas corpus on the grounds: (1) that no thorough and impartial pre-trial investigation had been made; (2) that the Trial Judge Advocate had failed to call material witnesses; and (3) that he had been denied the assistance of effective counsel. The trial court sustained the writ and discharged the relator but the Sixth Circuit, *sub nom.* **Schilder v. Gusik** (180 F. 2d 662), without reaching the merits, reversed and remanded the case with instructions to dismiss the petition (without prejudice to a subsequent petition) on the ground that the relator had not applied to the Judge Advocate General for

a new trial under Article of War 53 (which had become effective *after* the trial court's order). In *reversing* and *remanding* the case to the Sixth Circuit for further proceedings, this Court, speaking through Mr. Justice Douglas, at pages 151-153, said:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition of habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. That is not only the holding of the Court in a long line of cases (see *Mooney* v. *Holohan*, 294 U. S. 105, 115; *Ex Parte Hawk*, 321 U. S. 114, 116); it is the rule which Congress recently wrote into the Judicial Code, 28 U. S. C. § 2254. The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created, as indeed is implicit in cases from a state court whose review we denied pending exhaustion of a newly created state remedy. See *Walker* v. *Ragen*, 338 U. S. 833; *Marks* v. *Ragen*, 339 U. S. 926. Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

* * * * *

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"Trial of the case in the District Court had ended before the effective date of Article 53 and the question of the exhaustion of the new remedy which the Article affords was not raised until the case was in the Court of Appeals. We conclude that in the interests of justice the Court of Appeals, instead of reversing the District Court and ordering the petition to be dismissed, should have done what the Court of Appeals in *Whelchel* v. *McDonald*, 340 U. S. ....., 71 S. Ct. 146, did under like circumstances and held the case pending resort to the new remedy under Article 53. * * *".

Although there are many cases in the various Courts of Appeal and District Courts which, following the rule laid down by the Fifth Circuit in the said case of **Whelchel v. McDonald**, 176 F. 2d 260, have refused writs of habeas corpus sought by persons under sentence by Army courts-martial until after the relator has first applied to the Judge Advocate General for a new trial under Article of War 53 (see **Spencer v. Hunter**, 177 F. 2d 370; **McMahon v. Hunter**, 179 F. 2d 661, cer. den., 339 U. S. 968; **Simmons v. Hunter**, 179 F. 2d 664, cer. den., 339 U. S. 968; **Hiatt v. Burchfield**, 179 F. 2d 679, cer. den., 339 U. S. 987; **Hiatt v. Fugate**, 179 F. 2d 679; **Hiatt v. Jackson**, 179 F. 2d 680, cer. den., 339 U. S. 968; **Reck v. Hunter**, 179 F. 2d 784; **Dickens v. Hunter**, 179 F. 2d 784; **Massey v. Humphreys**, 85 F. Supp. 534; **Sinclair v. Hiatt**, 86 F. Supp. 828; **Olsen v. Hiatt**, 89 F. Supp. 174; **Cochrane v. Zuppmann**, 89 F. Supp. 329; **Sweeney v. Hiatt**, 89 F. Supp. 416; and **Williams v. Humphrey**, 89 F. Supp. 538), *none* of these cases involved an individual who had received an "honorable discharge" prior to his trial by court-martial and, so far as we are presently advised, *no* case, other than the case at bar, has as yet been adjudicated involving the effect of such a discharge upon the question of whether such a civilian (viz.: one "honorably discharged" *before* his trial by court-martial) must, before seeking his release by way of habeas corpus,

first apply to the Judge Advocate General for a new trial under Article of War 53.

As pointed out in our Summary Statement (*ante*, pp. 5-7), even were this Court (contrary to our position) to hold that such a civilian must nevertheless first exhaust such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525), the relator's "remedy" under Article of War 47 had been "exhausted" *before* the hearing in the District Court; his "remedy" under Article of War 50 (e) has also long since been "exhausted"; and the only such "remedy" still possibly open to him is an "application" to the Judge Advocate General for a "new trial", etc. under Article of War 53.

In view of the foregoing, we respectfully submit (1) that the relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53; and (2) that, in holding to the contrary, the Court of Appeals for the Seventh Circuit has in this case decided an important question of federal law which has not, in the recent **Whelchel**, **Gusik** or other cases been, but should be, authoritatively settled by this Court because of the effect of such a ruling upon the rights and privileges of millions of veterans holding such discharges.

Respectfully submitted,

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APPENDIX.

10 U. S. C. A. 1518 (Article of War 47) provides:

§1518. Action by convening authority (article 47)—Assignment of judge advocates; channels of communication

* * * * *

Action on record of trial

(c) Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

Approval

(d) No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: *Provided*, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

Who may exercise

(e) Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

Powers incident to power to approve

(f) The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52. As amended June 24, 1948, c. 625, Title II, § 223, 62 Stat. 634.

10 U. S. C. A. 1521 (Article of War 50) provides:

§1521. Appellate review (article 50)—Board of review; judicial council

(a) The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer.

Additional boards of review and judicial councils

(b) Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

Branch offices

(c) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer

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of the Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which the Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

Action by board of review when approval by President or confirming action is required

(d) Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of

legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirming of the sentence by the President is required under article 48a.

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Action by board of review in cases involving dishonorable or bad-conduct charges or confinement in penitentiary.

(e) No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review, holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby

be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

Appellate action in other cases

(f) Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.

Weighing evidence

(g) In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

Finality of court-martial judgments

(h) The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursu-

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ant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53. As amended June 24, 1948, c. 625, Title II, § 226, 62 Stat. 635.

10 U. S. C. A. 1525 (Article of War 53) provides:

§1525. Petition for new trial (article 53)

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49 and 50, and all dismissals, and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of

the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States. As amended July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; June 24, 1948, c. 625, Title II, § 230, 62 Stat. 639.

10 U. S. C. A. 1566 (Article of War 94) provides:

§1566. Frauds against the Government (article 94)

Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature

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upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof: *Provided*, That any person, subject to military law, who commits larceny or embezzlement with respect to property of the United States, furnished or intended for the military service thereof, or with respect to other property within the purview of this article, steals said property within the meaning of this article; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same; or

Who enters into any agreement or conspires to commit any of the offenses aforesaid;

Shall, on conviction thereof, be punished by fine or

imprisonment, or by such other punishment as a court martial may adjudge, or by any or all of said penalties. If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom. As amended June 24, 1948, c. 625, Title II, § 237, 62 Stat. 640.

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APR 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. ~~584~~ 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 564

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM.

In order to maintain some semblance of continuity, we shall reply to respondents' rather desultory "discussion" under the point headings used in our original petition and supporting brief.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT RR 1—1 (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES", CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

While the respondents' statements (pp. 7-8) with respect to the effect of Articles of War 28, 107 and 108 upon the *scope* of the relator's 1946 discharge might, at first blush, appear plausible enough, they do *not* accurately reflect *either* the actual provisions or the effect of the Articles of War and pertinent regulations. Before going into details, we deem it necessary first briefly to present the situation

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leading up to and resulting in the discharge of the relator and millions like him from the service during the years 1945-1946.

As the Court doubtless recalls, after our victory in Europe (VE), the Secretary of War, by direction of the President, drew up and, on May 12, 1945, promulgated certain procedures designed to reduce the size of our army by releasing from service first those who most deserved to be released and, after our victory over Japan (VJ), revised and accelerated those procedures **(RR 1—1, "PLAN AND PROCEDURES FOR READJUSTMENT OF MILITARY PERSONNEL.")**[1]

1.
"**RR 1—1** **18 March 1946.**

"**PLAN AND PROCEDURES FOR READJUSTMENT OF MILITARY PERSONNEL.**

"**SECTION I.**

"**GENERAL PRINCIPLES.**

* * * * *

"2. **Separation Criteria.**

"a. On 12 May 1945 the Adjusted Service Rating system, correlating length of service, oversea service, and parenthood, became effective. This system provided a score for individual officers and enlisted personnel and established a priority for release. (For computation of scores see Appendices I and II.)

"b. On 2 September 1945 all scores were recomputed by application of factors and multiples to reflect additions for the period from 12 May 1945 to 2 September 1945. No deductions for any reasons were contemplated with respect to the 12 May 1945 total. The 2 September 1945 score is the critical score.

"c. Critical scores and alternate separation criteria are announced only by the War Department for use in determining eligibility of military personnel for release.

* * * * *

"11. **Separation Authority.**

"These regulations will be cited as authority for separation on records of all military personnel who are separated by virtue of ASR score, length of service, age (except those separated under sec. V, WD Circular 290, as amended by sec. IV, WD Circular 376, 1945), or marriage, or dependent children in the case of WACs and female Medical Department officers; appropriate War Department directives will be cited as authority for separation or

It should be noted that said discharge procedures made *no* distinctions whatsoever between those who had *voluntarily* "*enlisted*" (or had accepted commissions) and those who had *involuntarily* been "*inducted*" ("drafted") into the service and, on the contrary, applied to

"*All* military personnel"

and to

"individual officers and enlisted personnel"

alike and provided for the discharge of all who had "enlisted" or had been "inducted" *except*

"*those who volunteer for retention on duty* or whose retention is *specifically* authorized by War Department directives." (Emphasis added.)

As this Court probably also recalls, the War Department, from time to time during the years 1945-1946, announced certain

"critical ASR scores"

which varied with the different ranks and grades and became progressively *lower* as time went on, thus resulting in the gradual and fairly orderly demobilization of the Army.

It should also be noted that, in and by said RR 1-1 the

---

discharge on records of military personnel who are separated for other reasons.

* * * * *

"**SECTION II.**

"**ENLISTED PERSONNEL.**

* * * * *

"13. **Eligibility for Release.**

"All commanders will, without unnecessary delay, take appropriate action leading to the separation of enlisted personnel made eligible for separation under current War Department criteria, except those who volunteer for retention on duty or whose retention is specifically authorized by War Department directives."

* * * * *".

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authority of the President and of the Secretary of War to discharge any and

"all military personnel"

was delegated down to those commanders who actually carried out the "demobilization" in the field, they being directed that

"these regulations will be cited as authority for separation."

With this background in mind, let us now examine the *details* of respondents' said statements with respect to the effect of Article of War 28, 107 and 108 upon the *scope* of relator's 1946 discharge.

Respondents' **first** statement (p. 7) on this issue is that

"But that discharge related only to his term of service pursuant to his induction in 1944, both by reason of the dates specifically appearing in the discharge, and as a matter of law."

Insofar as the **form** of his said discharge is concerned, it should be kept in mind that, although it did give "16 Mar 44" as the date of his "induction", said certificate also recited that he had

"ASR score (2 Sept 45) 44",

that his discharge was for the

"convenience of the Government RR 1-1 (Demobilization)"

and that he was

"honorably discharged",

not from any particular "enlistment" or "induction" but from

"from the military service of the United States".

Respondents' **next** statement (p. 7) that

> "The legal irrelevance of the 1946 discharge to the earlier 1930 enlistment results from the *prohibition in AW 108* of any but a special type of discharge when the discharge takes place *before the expiration of an enlistment*". (Emphasis added.)

is also *unsound* and *inaccurate* in at least 2 particulars.

In the **first** place, giving the relator credit for all *honorable* service, ("good time") performed by him between March 16, 1930 (when he enlisted, R. 2, 7) and July 2, 1930 (when he went A.W.O.L., R. 3, 7); between October 13, 1942 (when he was "restored" to duty, R. 7) and March 15, 1943 (when he again went A.W.O.L., R. 7); and between March 16, 1944 (when he was inducted, R. 3, 7) and June 29, 1946 (when he was honorably discharged, R. 3, 7); (viz: respectively, 3 months, 16 days; 5 months, 2 days; and 2 years, 3 months, 13 days; or a total of exactly 3 years), **the relator had actually served his three year** (1930) **enlistment in full and,** had there intervened no war "emergency", **would have been discharged in due course on the same day** (June 29, 1946) **on which he was actually discharged.**

In the **second** place, said *AW 108 does not actually prohibit* an *earlier* discharge in *all* events but, on the contrary, says

> "*except by order of the President, the Secretary of War*", (Emphasis added.)

which exception *destroys* the respondents' said contention *because*, in the case at bar, *the relator was in fact discharged*

> "for the convenience of the Government RR 1-1 (Demobilization")

"*by order of the Secretary of War*"

under RR 1-1 (the so-called "point system", heretofore ex-

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plained in detail) which was promulgated by the Secretary of War.

Respondents' **further** statement (p. 7) that

> "Moreover, *AW 107 prevented* the expiration of an enlistment *before* the making up of time lost in desertion," (Emphasis added.)

is also patently unsound, **first**, because, as we have demonstrated, *all "time lost in desertion" had in fact actually been made up by honorable service* as of the date of his *actual* discharge; and, **second** because said *AW 107 does not actually require* that such "bad" time be made up and *only* says that an individual so absenting himself shall

> "be *liable* to serve"

such *additional* time, which provision, in the case at bar, did *not "prevent"* such discharge because, by issuing him an "honorable discharge" on June 29, 1946, from

> "the military service of the United States"

for the

> "convenience of the Government RR 1-1 (Demobilization),"

the Government irrevocably elected *not* to make him

> *"liable"*

to serve further.

The respondents' **further** contention (pp. 7-8) that

> "this time could *not* be deemed made up by the 1944-46 military service, since an *enlistment* by a soldier subject to an existing enlistment 'without having received a regular discharge' is defined in AW 28 as a desertion and the soldier is deemed to have *enlisted* fraudulently". (Emphasis added.)

is also patently unsound in that *this* particular article

(AW 28, respondents' memorandum, footnote, p. 8) relates only to a deserter from one **"enlistment"** (from which, in peacetime, he could, after a year's service, "buy" himself out for a certain sum of money varying with the length of his remaining term of service, AR-615-360, pars. 19-23, 14 Sept. 1927) who *voluntarily*

"again enlists"

in the Army (in order to secure certain allowances and other pecuniary benefits) and does *not* relate to one who is, in wartime, *involuntarily "drafted" or*

"inducted"

into the service, as is the situation in the case at bar. Hence the relator's services under his 1944-46 *"induction" must be, and was,* as is evidenced by his "honorable discharge" on June 29, 1946, from

"the military service of the United States,"

credited against any and all subsisting "enlistments" and "inductions."

Respondents' **further** contention (p. 7) that

> "The enlistment from which petitioner deserted would not otherwise have expired until January 25, 1948, because *the Extension of Service Period Act extended its term to six months after the termination of the war* (see Appendix A, *infra,* pp. 18-19)."

is likewise patently unsound, **first,** because said Extension of Service Act did *not* extend such service *until six months after the war in all events,* but, on the contrary,

> *"Provided, that nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case."* (Emphasis added.)

which proviso *destroys* the respondents' contention be-

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cause the Secretary of War, *by direction of the President,* under the so-called "point system" (RR 1-1), by honorably discharging the relator "from the military service of the United States" "for the convenience of the Government RR 1-1 (Demobilization)", *did "terminate such period of service" at "an earlier date"*, and **second**, were the respondents' said contention to be adopted, the United States Government would have been *without power,* after V-J day, *to reduce the size of its armed forces* and would therefore have been *required* to keep under arms *all* of its millions of soldiers because *all* persons who so served, whether by

"enlistment, appointment, or commission"

were on active duty under substantially the same provisions respecting the *duration* of their service.

As a result of the foregoing, it seems clear that the respondents' conclusion (p. 8) that

> "The combined effect of Articles 28, 107 and 108 accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in Article 108,"

is unsupported by and contrary to the actual provisions and effect of the Article of War and pertinent Regulations and the facts of this case.

At pages 8-9, respondents cite and quote certain language from the "Manual for Courts-Martial, United States Army" and certain abstract decisions reflected in the Dig. Op., JAG. This is but an attempt to say that

"It is so because I have said so",

commonly known as

"lifting one's self by one's own bootstraps".

As this Court, in *United States ex. rel. Hirshberg* v.

Cooke, 336 U. S. 210, 69 S. Ct. 530 (1949), with respect to a rather similar contention in a Navy case, recently said:

> "Passing over this argument, however, we are unable to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U.S.C. § 591, 34 U.S.C.A. § 591, as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. *United States* v. *Symonds*, 120 U. S. 46, 50, 49, 7 S. Ct. 411, 412, 413, 30 L. Ed. 557".

With respect to the **second** portion of our said contention (viz.: *conflict* with the decision of the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981), the respondents say (pp. 9-10) that

> "the *Drainer* decision is distinguishable"

because

> "The Articles for the Government of the Navy, as distinguished from AW 107, did not make *mandatory* the serving of time lost in desertion, nor did they *prohibit* a discharge prior to the end of a term of enlistment, as is the case under AW 108." (Emphasis added.)

This is *not* so because, as we have previously demonstrated (*ante*, pp. 6-9), *AW 107 did not* actually

> "*make mandatory* the serving of time lost in desertion", (Emphasis added.)

and *AW 108 did not* actually

> "*prohibit* a discharge *prior* to the end of a term of enlistment". (Emphasis added.)

Furthermore, as this Court pointed out in *United States ex rel. Hirshberg* v. *Cooke*, 336 U.S. 210, 69 S. Ct. 530 (1949), were this view to be adopted as correct

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> "there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces".

Hence the two cases are *not* in fact distinguishable and respondents must fall back on their rather feeble contention (p. 10) that

> "Moreover, the *reasoning* of the decision is *unpersuasive* and ascribes *undue* weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34, 36, * * *". (Emphasis added.)

which practically *concedes* that the Court *should* grant certiorari to resolve the conflict.

Insofar as our statement that a failure by this Court to reverse the decision in this case will

> "cause greatest concern on the part of millions of veterans holding such discharges"

is concerned, the respondents apparently have no answer.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

The respondents' desultory answer to the first portion of our said contention is more remarkable for what it *fails* to say than for what it *does* say. For example, it says absolutely *nothing* about the *three* (*Sanantonio*, 265 F. 287; *Viscardi*, 265 F. 695; and *Wilson*, 33 F. 2d 695) cases where lower Federal courts have released honorably discharged servicemen, *not only without requiring them first to "exhaust" any post-conviction "administrative remedies" but without requiring them even to stand trial*, on the ground that, by virtue of such discharges, they had become "*civilians*", no longer subject to trial by courts-martial.

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Although they *do* discuss (under Point I, pp. 10-11) *another* aspect of *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210, they say absolutely *nothing* concerning the fact that in that case *this* Court, in *reversing* the Second Circuit (and in thus *discharging* the relator who had received an "honorable discharge" prior to his trial by court-martial) did *not* require the relator (as such a civilian) first to exhaust any post conviction "administrative remedies" before seeking his release on a writ of habeas corpus.

In support of their personal conclusion (p. 5) that

> "We think the court of appeals was clearly correct in holding on this record that petitioner's attempt to attack collaterally the jurisdiction of the Army to try him for his 1943 desertion is premature. *Gusik* v. *Schilder*, 340 U. S. 128",

they say (p. 5) that

> "At the time of the decision below, the review by the Board of Review required by AW 50 (e) had not been completed and there had been no final appellate approval of petitioner's conviction and sentence, without which his ultimate sentence could not be executed. It follows *a fortiorari* from the *Gusik* decision, requiring the exhaustion, in addition, of the new remedy by way of a motion for a new trial or other relief provided by AW 53 before recourse may be had to habeas corpus, that petitioner had no standing to attack his conviction."

While it *is* true that the petitioner had not, as of the date his petition for a writ of habeas corpus was filed, "exhausted" such "administrative remedies" as may be available to *military* personnel under the Articles of War, it does *not* follow *a fortiorari* or otherwise, from the *Gusik*, *Whelchel* or other cases, that, as such a *civilian*, his attack upon his conviction was "premature" or that he "had no standing to attack his conviction".

On the contrary, as we pointed out (pp. 30-33) in our original brief, *neither* of these cases involved a veteran who had received an "honorable discharge" prior to his conviction by court-martial; and in *neither* of said cases did this Court pass upon or even discuss the precise question now raised by this petition for certiorari.

After stating (p. 5) that

> "Neither is petitioner in any better standing as of this date,"

respondents proceed (pp. 5-6) to point out **(1)** that the Board of Review did not complete its review of the record of petitioner's trial until October 30, 1950 (when they held it legally sufficient to support the finding and the sentence); **(2)** that although the Judge Advocate General, on October 31, 1950, transmitted such holding to the respondent Chamberlin and "advised him that he was authorized to order the execution of the sentence", no further action has as yet been taken; and **(3)** that the respondent Chamberlin, despite such affirmance by the Board of Review, still has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. To this we add the further fact **(4)** that, although the relator's trial by court-martial ended on July 7, 1949, the respondent Chamberlin did not even take his initial action approving the findings and mitigating the sentence until December 7, 1949 (respondents' memorandum, p. 19), *some five months later.* The respondents also contend (p. 6) that

> "In the absence of a final order by General Chamberlin",

over a year and a half after the conclusion of relator's trial by court-martial,

> "the administrative process under AW 50(e) is incomplete even for the purposes of a motion under

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AW 53. Cf. *Falbo* v. *United States*, 320 U. S. 549, 553-554." (which case, incidentally, involved only a conscientious objector, and had *nothing* whatsoever to do with either "honorably discharged" servicemen or AW 53.)

We submit that all that these dilatory details establish is the soundness of the courts' statements (in *discharging* relators who had received "honorable discharges" *before* their trials by courts-martial) in the *Viscardi* case (265 F. 695), that it recognized

> "the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and in the *Wilson* case (33 F. 2d 695), that a

> "person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil court for relief from arrest and trial * * * by a court-martial."

The *real* issue presented by the respondents' said contention is whether, by failing for over a year and a half to complete what are supposed to be entirely "automatic" review procedures, the Army can keep a *civilian* in confinement and *prevent* him from testing its jurisdiction to try him at all *until* the question of his confinement has become *moot*.

We submit that this question *must* be answered in the *negative* if we are to preserve our present system of

"equal justice under law".

Insofar as the **second** portion of our said proposition (viz: that this issue has *not* been, but *should be*, settled by this Court because of the effect of such a ruling upon

the rights and privileges of millions of veterans holding such discharges) is concerned, the respondents apparently have *no* answer.

CONCLUSION.

In view of the foregoing considerations, we respectfully submit that the petition and supporting brief, the respondents' memorandum and this reply *all* affirmatively demonstrate not only **(1)** that there *is* an unresolved *conflict* between the Seventh and Ninth Circuits with respect to Point I, and **(2)** that in the ruling described in Point II, the Seventh Circuit *has* decided an important question of Federal law which has *not* been, but *should be* decided by *this* Court; but that this case presents a situation of such importance to the millions of veterans who hold similar discharges as to call for the exercise by this Court of its power to review the decision of the court below.

We also respectfully submit that it would be highly inappropriate and unfair to all concerned to adopt the respondents' suggestion (p. 13) that this cause merely be remanded to the Court of Appeals

> "with directions to hold it pending reasonable opportunity for completion of the administrative processes".

Either the relator (by virtue of his prior "honorable discharge" from "the military service of the United States" "for the convenience of the Government RR 1-1 (Demobilization)") *was a civilian or he was not;* and *such a civilian either is or is not required first to exhaust such "administrative remedies" as may be available to military personnel under the Articles of War before seeking his release by way of habeas corpus.*

We submit that these clear cut issues, of such importance to all ex-servicemen, should not be sloughed off, and

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thus casually decided against them, through the device suggested by the respondents.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

In order to maintain some semblance of continuity, despite the transposition in the brief for the respondents of the order of our points, we shall reply to said brief under the point headings used in our original petition (and supporting brief) which stands as our opening brief on the merits.

Furthermore, in order to avoid confusion and to keep the length of this reply to a minimum, we shall ignore the respondents' "Summary of Argument" (pp. 6-11) and reply only to the main "argument" which it purports to summarize.

THE QUESTIONS PRESENTED.

The respondents (p. 2) say that the **second** "question presented" is

> "Whether an honorable discharge for the period for which petitioner had been drafted releases him from liability for desertion from a former enlistment which had not expired, which he did not reveal at the time he was drafted and which was not known at the time of the discharge."

The wording of this "question" involves one of the oldest tricks in the bag, viz.: the so-called "non-evident major premise" fallacy, in which the proponent of a proposition blandly *assumes*, at the outset, the very matters to be proved and then, having done so, coasts easily to his conclusion. In the case at bar, the very matters to be proved by the respondents, which they attempt to *assume* by the wording of the said "question", are:

1. That the petitioner's honorable discharge in 1946 "from the military service of the United States" "for the convenience of the Government" under "RR1-1" (the so-called "Point System") was, in fact or in law, merely "a discharge for the period for which petitioner had been drafted";
2. That the petitioner's earlier enlistment "had not expired";
3. That "he did not reveal" his earlier enlistment "at the time he was drafted"; and
4. That such facts were "not known at the time of his discharge".

We respectfully submit that the *real* "questions presented" are as set forth in paragraphs 1 and 2 on pages 2-3 of our original petition.

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STATEMENT.

The respondents' statement (p. 3) that the petitioner, at the time of his draft induction on March 16, 1944, "did not reveal his former enlistment and desertion (R. 7, 8)", while alleged in the respondents' answer (R. 8), was not established by proof. The respondents' further statement (p. 3) that, in 1948, the Criminal Investigation Division of the Army, "through its fingerprint department, discovered that petitioner was the person who had deserted in 1943 (R. 7, 15)" is neither alleged in the respondents' answer (R. 6-9) nor established by any proof other than argument by the respondents' counsel (R. 15). Nor, the petitioner having been inducted under the same name, William H. Giese, and, despite the Army's having had the same fingerprints on file from the time of his induction in March of 1944 until his honorable discharge in June of 1946, no explanation is offered by the respondents why it took the Army until late in 1948 to ascertain that he was the same individual. The respondents' description of the form of the Petitioner's honorable discharge of June 29, 1946 fails to note that it also stated that it was issued for the "CONV OF GOVT RR 1-1 (DEMOBILIZATION) AR 615-365 & AG 210.8 ALFSI 12 JUN 46 SERVICE" and that he had "ASR SCORE (2 SEP 45) 44" (R. 39). Respondents' further statement (p. 6) that,—despite General Chamberlin's previous "approval" of the petitioner's sentence (as reduced and mitigated by him), despite the Board of Review's "holding" that the record is "legally sufficient to support * * * the sentence" and despite the Judge Advocate General's order giving General Chamberlin merely "authority to order the execution of the sentence",—"Under AW51, (a) * * * General Chamberlin has the power to mitigate, remit or suspend the whole or any part of the sentence", is, we contend, *not* a correct statement of the effect of the said Article of War.

ARGUMENT.

I.

THE ISSUANCE, DURING THE GENERAL DEMOBILIZATION IN 1946, OF A DISCHARGE, "FOR THE CONVENIENCE OF THE GOVERNMENT", UNDER "R R 1-1" (THE POINT SYSTEM) CERTIFYING THAT THIS PETITIONER WAS THEREBY "HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND INDUCTIONS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR DESERTION OR ANY OTHER OFFENSE NOT SPECIFIED UNDER ARTICLE OF WAR 94.

As is pointed out in our petition for certiorari (pp. 14-28), all Judge Advocates General of the Army and Navy, at least five Attorneys General of the United States, innumerable District Courts and Courts of Appeal and this Court have uniformly held that an individual once separated from the service thereupon ceases to be amenable to military or naval jurisdiction and cannot thereafter be tried by court-martial except for certain offenses specified under Article of War 94 or the comparable Article 14 of the Articles for the Government of the Navy, both of which relate only to pecuniary frauds against the Government and are not charged here.

The respondents concede this to be the general rule but contend (pp. 23-36):

> **"that petitioner's honorable discharge covered no more than it purported to cover, i. e., petitioner's serv-**

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ice from March 16, 1944, to June 29, 1946. The honorable discharge, therefore, did not condone petitioner's desertion in 1943 from his prior enlistment or preclude his trial by court-martial for such desertion."

Under this heading, the respondents argue **first** (pp. 24-26) that the

"petitioner's 1930 enlistment was still in effect at the time of his trial before the court-martial unless the 1946 discharge acted as a release of it."

While it is quite true, as respondents say at page 24, that "AW 107 * * * provides that a deserter, before being discharged from his enlistment, is *liable* to serve, after his return to a full duty status, the balance of his *enlistment term* remaining unserved at the time of his desertion" (emphasis ours),

the *conclusions* which the respondents attempt to draw therefrom are not only not supported by the wording of the said Article of War 107 but exhibit a decided ignorance or disregard of well established Army law and regulations. The *key* words are

"*liable* to serve"

and

"*enlistment* period".

The respondents' repeated assertions that this article (p. 28)

"*prohibited* the discharge of petitioner" (emphasis ours);

made (p. 31)

"*mandatory* the serving of time lost in desertion" (emphasis ours);

and that (p. 25)

"Because of his desertions, his obligation to serve had not been discharged at the time of his apprehension in 1949,"

are not supported by any authority whatsoever and are flatly contrary to the well settled Army rule for generations that this "*liability*" to serve out "bad time" *can* be *waived* and *is waived* by a *discharge* from the service without requiring that such time be served out prior to such discharge.[1]

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1. In Op., JAG, 1880 (referring to then AW 48, which later became AW 107 and, in pertinent part, then provided that "every soldier who deserts the service of the United States shall be *liable* to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment") (emphasis ours), it is said that, p. 22:

"4. The enforcement of the *liability*, where enforced at all, is generally postponed till after the execution of the punishment (if any), imposed upon the deserter by his sentence. A deserter *may* still be required to make good the time included in his unauthorized absence from the service, although his *term of enlistment* has expired pending a term of confinement adjudged him by court martial on conviction of his offence, *provided he has not been discharged*. XXXII, 40.

"5. The United States may *waive* the liability imposed by the first clause of the Article. *It is in fact waived* where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by Art. 4 to discharge soldiers. So it is *waived* where the soldier is adjudged to be dishonorably discharged by sentence of court martial, and this punishment is duly approved and thereupon executed. XXIX, 507; XXX, 506; XXXVII, 416.

"6. The provision of the *second* clause of this Article applies only to desertions committed while the soldier is duly in the service and before his *term of enlistment* has expired. For an escape from military custody, committed *after* the expiration of *the period for which he enlisted*, and while he is held in arrest prior to trial or awaiting sentence, or in confinement under sentence,—a soldier cannot be made amenable, under this Article, to trial as for a desertion. XXXIV, 98. A deserter, who has been duly *discharged* from the service, of course does *not* remain amenable to trial under this Article. XXXI, 48."

In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 130:

"**XLVIII B.** The United States may *waive* the liability imposed by the first clause of the article. *It is in fact waived* where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by Article 4 to discharge soldiers. So *it is waived* where the soldier is adjudged to be dishonorably discharged by sentence

The respondents' further assertions (pp. 9, 24, 25) that the petitioner's "enlistment" was, by the Extension of Service Act, extended to January of 1948, and inferring that his "bad time" must, under said AW 107, be made up

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of court-martial, and this punishment is duly approved and thereupon executed. R. 29, 507, Dec., 1869; 30, 506, July, 1870; 37, 416, Mar., 1876. Nor does a deserter who has been duly discharged from the service remain amenable to trial under the last clause of this article. R. 31, 48, Nov., 1870."

p. 611:

"**I B 2 b (1).** After a soldier had served three years he was discharged per expiration of term of enlistment. He *could have been held* to make good time lost, but this was not done, due to neglect on the part of the company clerk and the first sergeant. *Held*, that the discharge was for the convenience of the Government and that the soldier was entitled to have the enlistment recorded as a complete enlistment under the provisions of the act of May 11, 1908 (35 Stat. 109). C. 18438, Sept. 19, 1911."

In Dig. Op., JAG, 1912-40, it is said (emphasis ours), pp. 375-377:

"**465 (A.W. 107). SOLDIERS TO MAKE GOOD TIME LOST.** Sec. 1, Ch. II, act of June 4, 1920 (41 Stat. 809); 10 U.S.C. 1579.

* * *

"The fact that the statute of limitations is successfully pleaded in bar of trial for desertion does not operate to release the soldier from his military status, in the absence of a discharge. *Under A.W. 107*, regardless of the extent of his absence from duty, *the Government has the right to require further service* in a full-duty status sufficient to make up the terms of his *original enlistment, provided only the soldier has not been separated from the service either by operation of law or under A.W. 108.* 342.02, July 10, 1928.

* * *

"**(6) WAIVER BY GOVERNMENT.** The *liability* imposed on the soldier by A.W. 107 *may be waived* by the Government, and *it will be so waived when the soldier is discharged by competent authority without being required to make up time lost.* 220.89, Oct. 5, 1927.

"The *liability* to retention in the service imposed by A.W. 107 may be *waived* by the Government, and if it is desired to relieve a soldier from the consequences of this article, such may be accomplished by action of the Secretary of War in excusing the absence. If at the expiration of his regular term of enlistment a soldier should be discharged by proper author-

after that date, also demonstrates an ignorance or disregard of Army regulations to the contrary.[2]

In an attempt to answer our earlier contention (p. 6 of Petitioner's Reply to Respondent's Memorandum), that giving the petitioner credit for all *honorable* service (good time) performed by him between March 16, 1930, when he enlisted, and June 29, 1946, when he was honorably discharged, he had actually served out his three-year 1930 enlistment in full on the date of his discharge "from the military service of the United States," the respondents (pp. 25-26) say that:

> "The time lost from this enlistment was not made up by the 1944-1946 military service since an *enlistment* by a soldier already subject to an existing enlistment 'without having first received a regular discharge' is defined in A W 28 • • • as a desertion and the soldier is deemed to have *enlisted* 'fraudulently'."

This contention by the respondents ignores (1) the clear-cut distinction in Army law and regulations between an "*enlistment*", which is voluntary and establishes a "contract," and a draft "*induction*," which is *involuntary*;

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ity the right to retain time in the service will be considered as *waived*. 290.414, Misc. 55, • • 10.

"On the question as to the authority of the Secretary of War to reopen a case where time lost by an enlisted man had been held due to misconduct and it later appeared that the diagnosis on which the holding was based was erroneous, *Held*, That AR 345-415, so far as it relates to making good time lost under A.W. 107, is a regulation for administrative convenience, and is subject to *waiver* by the Secretary of War so far as concerns the finality of any conclusion thereunder. *Held further*, That while A.W. 107 makes the soldier *liable* to serve out time lost, such *liability may be waived* by the Government. 220.7191, Sept. 6, 1930."

2. AR 615-360, 25 May 1944, "Enlisted Men, Discharge; Release from Active Duty," provides (in *1, d,* (2)) that

"(2) The provisions of the one hundred and seventh article of war do *not* apply where the term of service has been extended by operation of law" (emphasis ours).

and (2) the well-settled Army rule that service, even under a "fraudulent *enlistment*" (which this was *not*) is *valid* service *unless* the soldier is actually *discharged* from the service for "fraudulent *enlistment*," which was *not* done here.

A W 28 (10 U. S. C. 1499), upon which respondents rely in urging said contention, provides that:

> "Any soldier who, without having first received a regular discharge, against *enlists* in the Army, • • • shall be deemed to have deserted the service of the United States; and where the *enlistment* is in one of the forces of the United States mentioned above, to have fraudulently *enlisted* therein." (Emphasis ours.)

A W 54 (10 U. S. C. 1526), which must be considered in conjunction with A W 28, provides that:

> "**Art. 54. Fraudulent enlistment.**—Any person *who shall procure himself to be enlisted* in the military service of the United States by means of wilful misrepresentations or concealment as to his qualifications for *enlistment*, and shall receive pay and allowances under such enlistment, shall be punished as a court-martial may direct." (Emphasis ours.)

It should be noted that these articles speak only of "*enlistment*", and do *not* mention "*induction*". While the rather loose term "enlisted men" includes *both* those who voluntarily "enlist" and those who are involuntarily "inducted"[3], those who have voluntarily "*enlisted*" and those who have involuntarily been "*inducted*" are treated very *differently* in Army laws and regulations.[4]

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3. AR 615-360, 25 May 1944, "Enlisted Men, Discharge from Active Duty," provides in *1, b*, that (emphasis ours):
"The term 'enlisted men' as used herein includes all persons *enlisted or inducted* in any component of the Army of the United States in active Federal Service."

4. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 603:
"I A 1. The act of June 20, 1890 (26 Stat., 163), directed the mustering out of the enlisted men of the artillery detach-

Historically, this sharp distinction, between those who voluntarily "*enlist*" and those who are involuntarily "*inducted*" under the draft, is based in large part upon the

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ment at West Point and their immediate *reenlistment* as Army service men in the Quartermaster's Department. *Held*, that it does not authorize their being forced into a new *contract* or *reenlisted against their will, as this enlistment, like all others, is voluntary*. P. 41, 460, July, 1890."

p. 605:

"**I** A 9 a. A fraudulent *enlistment* is an *enlistment procured* by means of a willful misrepresentation in regard to a qualification or disqualification for *enlistment*, or by an intentional concealment of a disqualification, which misrepresentation or concealment has had the effect of causing the *enlistment* of a man not qualified to be a soldier and who, but for such false representation or concealment, would have been rejected. P. 56, 219; 63, 153; C. 17919, Apr. 28, 1905; 24912, May 10, 1909."

In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 178:

"**ENLISTMENT: When Oath of Enlistment is Necessary.**

"It is *unnecessary* to administer an oath to enlisted men brought into the service by *draft*. The one hundred and ninth article of war does *not* apply to them. With respect to men *voluntarily enlisted*, or to officers, *the oath is a statutory requirement*, and can not be waived or modified by the War Department."

AR 615-360, 25 May 1944, "Enlisted Men; Release from Active Duty," provides (emphasis ours):

"**47. Form of discharge certificate to be given.**—**a.** An enlisted man *who procured his entry into the Army through enlistment and who is to be discharged for the commission of a fraud* as discussed in paragraphs 43 and 44 will be given a discharge from the Army of the United States (blue). The reason for the discharge will be stated on the Certificate.

"**b.** Similarly a blue discharge will be given to those *enlisted men who were inducted into the service* due to misrepresentation with intent to deceive. No final statement or final payment roll will be furnished on an enlisted man when he is discharged under the provisions of this section and has no deposits due him but in lieu thereof, a full statement in writing will be furnished him stating the reasons for not submitting a final statement or final payment roll. See AR 345-475."

AR 615-190, 24 October 1950, "Enlisted Personnel; Service Requirements of the Selective Service Act of 1948," provides (emphasis ours):

"**6. Enlistment in the Regular Army or Air Force.**—**a.** For

fact that, in time of peace, an enlisted man, who voluntarily "reenlisted", received, under certain conditions, an "enlistment allowance"; and he could, by paying certain sums, which varied depending on the length of his unserved enlistment period, "purchase" his discharge from the Army.[5]

Hence an "*inductee*" *cannot* be guilty of "fraudulent *enlistment.*"

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discharge of *inductees* from the Army of the United States or Air Force of the United States *to enlist* in the Regular Army or Air Force, see AR 615-365 and AFR 39-14."

AR 615-375, 14 June 1950, "Enlisted Personnel, Discharge Certificates," provides (emphasis ours):

"**2. Certificate of discharge.**—**a.** Each enlisted person lawfully *enlisted, inducted, or ordered into active military service from a civilian* component, shall, upon separation from said service, be given a certificate of discharge by the commanding officer or designated officer of the installation effecting such separation, * * *."

5. AR 615-360, 26 Nov. 1942, "Enlisted Men, Discharge, Release from Action Duty," provided:

"**19. Authority.** That in time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit an enlisted man to purchase his discharge from the Army. The purchase money to be paid under this section shall be paid to a finance officer of the Army and deposited in the Treasury to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War, and may be available for the payment of expenses incurred during the fiscal year in which the discharge is made. See sec. 4, act June 16, 1890, 126 Stat. 158; 10 U.S.C., 651; M.L., 1939, sec. 232.

* * *

"24. Purchase price.— * * *

* * *

"c. **To be increased by amount of enlistment allowance; when required.**—In the case of an enlisted man who has received during his current enlistment the enlistment allowance of $50 or $25 multiplied by the number of years served in the enlistment period from which he was last discharged, authorized by section 9, act of June 10, 1922 (42 Stat. 629), and who purchases his discharge before he has completed 1 year of service (exclusive of time to be made good under the one hundred and seventh article of war) in the current enlistment, the price of purchase prescribed in *a* above will be increased by the amount of such enlistment allowance."

In the **second** place, it is also well established in Army law that, although service under a "fraudulent *enlistment*" (which this is *not*) does *not bar trial* for a *prior* desertion and, under AW 28 actually furnishes "*prima facie* evidence" of the prior desertion,[6] such service nevertheless is *not* in itself a "*desertion*" and is "*valid*" service and is recorded and counted such.[7]

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6. In Op., JAG, 1880, it is said (emphasis ours), pp. 23-24:

"1. *This Article*, in its first clause, *does not create* a specific offence, or *one distinct from the desertion made punishable in the 47th Article*, but declares in effect that a soldier who abandons his regiment shall be deemed none the less a deserter although he may forthwith reenlist in a new regiment. *It does not render the act of reenlistment a desertion, but simply makes the reenlistment*, under the circumstances indicated, *prima facie evidence of a desertion from the previous enlistment* from which the soldier has not been discharged, *or, more accurately, evidence of an intent not to return to the same.* The object of the provision, as it originally appears in the British code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force. XLII, 642."

7. In Op., JAG, 1880, it is said (emphasis ours), p. 224, that:

"5. *Held* to be no defense to a charge of desertion that the accused, at the time of the enlistment which he is charged with having abandoned, was an unapprehended deserter from the army; *an enlistment of a deserter being not void but voidable only.* XXXIV, 499, 623. (See Enlistment § 3.)" pp. 437-438:

"3. Secs. 1116-1118, Rev. Sts., providing that deserters, convicted felons, insane or intoxicated persons, and certain minors, shall not be enlisted, &c., are regarded as *directory only*, and *not* as necessarily making *void* such enlistments but as rendering them *voidable merely*, at the option of the government. In cases of such enlistments, except of course where the party, by reason of mental derangement or drunkenness, was without the legal capacity to contract, the government may elect to hold the soldier to service, subject to any application for discharge which may be addressed by himself or his parent, &c., either to the Secretary of War or to a United States court. XXXI, 342, 595; XLIII, 167. (See Third Article § 1.)

"A deserter who enlists and afterwards again deserts *cannot*,

The respondents' concluding assertion under this subpoint (p. 26) that (emphasis ours)

> "Moreover, the language of AW 107 that 'every soldier who in an existing or subsequent enlistment deserts * * * shall be *liable* to serve, after his return to a full duty status, for such period as shall, with the

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on being brought to trial for the second offence, *defend* on the ground that his enlistment was *void* and that he is not therefore amenable to trial. A plea of defence to this effect should not be sustained by the court. XXXII, 506."

In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 606:

"I A 9 f. A soldier was mustered into the service and later dishonorably discharged by sentence of a court-martial. He subsequently reenlisted in another regiment and served therein until mustered out. *Held*, that if one who is physically and mentally capable of rendering service as a private soldier is employed as a soldier and renders that service, he is a soldier even though there may be a law forbidding his enlistment in positive terms, unless that law declares him wholly incapable of making a contract of enlistment (so that any such contract entered into with him would be absolutely void). *The law* that merely provides that he shall not be enlisted would be violated by enlisting him, but that *could not alter the fact that he had been enlisted and had become a soldier and had performed service. If*, therefore, *men are enlisted* by a recruiting officer, through his own or their own willful disregard of the provisions of the law, or *through their fraud or deception*, or the recruiting officer's ignorance of the facts, *the contract is simply voidable, and has the same force and effect as the enlistment of any person until duly voided by the Government.* P. 48, 366, Aug., 1891; 55, 183, Aug., 1892; C. 4797, Aug. 15, 1898; 6398, May 11, 1899.

"I A 9 f (1). *Held* that the *fraudulent enlistment* of a soldier who had been discharged without honor *was not void* but that the Secretary of War may cause him to be tried for the fraudulent enlistment, or to be summarily discharged therefrom without honor, or to be restored to duty. C. 4077, Apr. 28, 1898.

"I A 9 f (2). *Held* that the *fraudulent enlistment* of a soldier who had been dishonorably discharged for desertion *was not void*. P. 48, 366; C. 321, Sept. 12, 1894; 359, Sept. 19, 1894; 494, Oct. 15, 1894; 1429, June 3, 1895; 1571, July 19, 1895; 1624, Aug. 6, 1895; 2115, Mar. 9, 1896; 2717, Oct. 30, 1896; 4711, July 30, 1898; 5592, Dec. 29, 1898."

p. 607:

"I A 9 f (3). *Held* that the *fraudulent enlistment* of an

time he may have served prior to such desertion • • • amount to the full term of that period' *would preclude crediting the 1944-1946 service* to the prior enlistment",

is simply *not true*, as has previously been demonstrated.

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escaped general prisoner was *not void, and in a particular case that his record after such enlistment warranted the remission of the unexecuted portion of his sentence, and the continuation of his enlistment.* C. 9099, Oct. 10, 1900.

"I A 9 f (4). *Held* that the *fraudulent enlistment* of a discharged general prisoner was *not void*, and that the soldier may be tried for the offense, discharged without honor, or restored to duty. C. 5481, Dec. 9, 1898.

"I A 9 f (5). *Held* that sections, 1116-1118, R.S., which provide that deserters, convicted felons, insane and intoxicated persons and certain minors shall not be enlisted, etc., are *directory only, and do not necessarily make void such enlistments*, but render them *voidable merely* at the option of the Government. P. 42, 82, July, 1890; 48, 367, Aug., 1891; C. 9490, Dec. 27, 1900, and Oct. 3, 1911; 17807, Apr. 10, 1905; 27507, Nov. 19, 1910; 27711, Jan. 17, 1911."

p. 608:

"I A 9 f (8): *An enlistment in violation of article 50 is not void, but voidable* at the option of the United States *only. Until so avoided service under it is valid service.* P. 43, 48, Sept., 1890; 53, 254, Apr., 1892; C. 321, 355 and 359, Sept., 1894; 494, Oct., 1894; 538, Oct. 22, 1894; 902, Feb., 1895; 1429, June, 1895; 1571, July, 1895; 1624, Aug., 1895; 2022, Jan., 1896; 2115, Mar., 1896; 2269, May, 1896; 2717, Oct. 30, 1896; 18492, Aug. 31, 1905. On a trial for an offense committed during such enlistment, a plea by the accused, in bar of trial, that this enlistment being fraudulent on his part, is void, should not be sustained. P. 39, 257, Mar., 1890; C. 23644, Mar. 2, 1909."

pp. 609-610:

"I A 9 l. There is distinction between a fraudulent contract of enlistment and the character of service thereunder. While the former is voidable at the option of the Government, *the service is legal service and, if the contract be not avoided on account of the fraud, the soldier would be entitled to such a discharge upon completion of his term as his services may merit. Held* that if the discharge is an honorable one, it should in general be viewed as establishing the fact that the service referred to therein was honest and faithful. C. 355, Sept. 18, 1894; 2022, Jan. 27, 1896; 2269, May 6, 1896; 6406, May, 1899.

"I A 9 m. *Held* that *time actually served under a fraudu-*

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Furthermore, the respondents' passing remark (p. 26) that

> "And see Army Regulations 615-360, (*infra*, note 15, p. 28,"

insofar as it implies that said regulation supports their said contention, is *not* correct and it is *not* supported by said or any other Army regulation, as even a cursory examination of said regulation will demonstrate.

It is therefore submitted that, as we said in our original petition (p. 6), giving the petitioner credit for all *honorable* service ("good time") performed by him between March 16, 1930 (when he enlisted, R. 2, 7) and July 2, 1930 (when he went A. W. O. L., R. 3, 7); between October 13, 1942 (when he was "restored" to duty, R. 7) and March 15, 1943 (when he again went A. W. O. L., R. 7); and between March 16, 1944 (when he was inducted, R. 3, 7) and June 29, 1946 (when he was honorably discharged, R. 3, 7); (viz:

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lent enlistment should be counted in computing the 30 years necessary to entitle the soldier to retirement under the provisions of the act of September 30, 1890 (26 Stat. 504). C. 355, Sept., 1894; 2022, Jan., 1896; 7108, Oct., 1899.

"I A 9 n. *Held* that the award of a certificate of merit to a soldier who was serving under a fraudulent enlistment was lawful, and that upon being restored to duty without trial he was entitled to the additional pay which is authorized by the statutes. C. 16644, July 27, 1904.

"I A 9 o. *Held* that *service under a fraudulent enlistment counts toward continuous service, unless the enlistment is voided as fraudulent by the Government.* C. 2269, May 6, 1896; 16644, July 27, 1904; 22333, Nov. 9, 1907."

pp. 999-1000:

"II A 1 d. *Held, that time actually served in a fraudulent enlistment* without a discharge from a previous enlistment *counts* for retirement. C. 355, Sept. 1894; 2022, Jan., 1896; 3777, Oct. 21, 1899; 7108, Oct., 1899."

In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 438:

"*2.* This office has repeatedly held that *a fraudulent enlistment is not void* but voidable at the option of the Government only, *and until so voided, service under it is valid* (Dig. Ops. JAG 1912, pp. 608, 609) • • •."

respectively, 3 months, 16 days; 5 months, 2 days; and 2 years, 3 months, 13 days; or a total of exactly 3 years), **he had actually served his three year** (1930) **enlistment in full and**, had there intervened no war "emergency", **would have been discharged in due course on the same day** (June 29, 1946) **on which he was actually discharged.**

The respondents' **second** main contention (under our Point I and their Point II) is (pp. 27-36) that:

> "**The 1946 honorable discharge did not release petitioner from his 1930 enlistment nor relieve him of liability for violations occurring during that enlistment.**"

Under this contention, the respondents begin by saying (p. 27) that:

> "The *only* statute dealing with discharges from the military service in AW 108. • • • This article prohibits a discharge before expiration of term of service except by order of certain officers or by sentence of a general court-martial. It has been held that no discharge may be given a soldier except as authorized by AW 108. • • •." (Emphasis ours.)

While it is quite *true* (*despite* respondents' own contradictory and unsound contention (pp. 9, 10, 25, 26, 28) that AW's 28 and 107 *also* affect the issuance and validity of discharges from the service) that

> "The *only* statute dealing with discharges from the military service is AW 108",

and while the other limited statements above quoted are also quite correct, the ~~petitioner's~~ RESPONDENTS' further conclusion (p. 28) that (emphasis ours):

> "The *combined* effect of Articles *28*, *107* and 108 accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted, in the

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> absence of a *special* order as provided in AW 108. *Cf. In re Markun,* 232 Fed. 1018 (E. D., Pa.). No. *such* order authorized petitioner's discharge,"

is *not* at all correct and is extremely misleading.

As we have heretofore demonstrated at length (*ante,* pp. 5-8), AW 107 merely makes a deserter *liable* to make up "bad time" but it is well established in Army law that such *"liability" can be* and *is waived* by the issuance of a discharge under AW 108.

Furthermore, as we have heretofore demonstrated (*ante,* pp. 7-8), the petitioner's "term of enlistment" was *not,* insofar as AW 107 is concerned, *extended* by the Extension of Service Act; as we have previously demonstrated (*ante,* pp. 8-15), the petitioner was *not* guilty of a "fraudulent *enlistment*" and, even if he were, his actual service thereunder, in the absence of a discharge on that specific ground, is *valid* service and counts as such; and, as we have previously demonstrated (*ante,* pp. 15-16), giving the petitioner credit only for his "good" time, he had actually served out his 1930 3-year enlistment in full on the date of his 1946 honorable discharge.

Insofar as the respondents' said quoted statement (p. 28) says (emphasis ours) that AW 108

> "accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted in the absence of a *special* order as provided in AW 108. *Cf. In re Markun,* 232 Fed. 1018 (E. D., Pa.). *No such* order authorized petitioner's discharge,"

it is not only inaccurate and contrary to Army law and regulations but is decidedly misleading.

In the **first** place, AW 108 has *no* requirement of a *"special"* order as respondents' counsel state. Said ar-

ticle says *only* (1) that "no enlisted man, • • • shall be discharged from said service"

> "without a certificate of discharge, signed by a field officer • • •,"

which was fully complied with in the case at bar (R. 39); and (2) that "no enlisted man shall be discharged from said service" (emphasis ours)

> "before his term of service has expired, *except by order of the President, the Secretary of War*, the commanding officer of a department, or by sentence of a general court-martial."

As above demonstrated, *no "special"* or *individual* order is required, either by said Article or in any other article or regulation and *all* that is required, to discharge a man "before his term of service had expired" is an

> "order of the President, (or) the Secretary of War."

The *only* case (*In re Markun*, 232 Fed. 1018) cited by respondents for their said contention does *not* support them. In the cited case there was *no* "certificate of discharge" (the soldier had only a "furlough"); it was signed only by a 1st Lieutenant who is *not* a "field officer" (Major and higher), and no order of the President or the Secretary of War authorized it.

It should also be noted at this point that even under the Extension of Service Act of December 13, 1941 (50 U. S. C., App. 732), relied upon by the respondents to extend the petitioner's "period of service" to January of 1948, it is expressly provided

> "That nothing in this section shall be construed to prevent the President from terminating such periods of service • • • at an earlier date in any case."

It is well settled in Army law that, with certain minor exceptions not here pertinent, the acts of the Secretary of

War and all Army regulations promulgated by him are, in law, the acts of the President as the chief executive of the nation, whether purporting to be his acts or not.[8]

8. In Op., JAG, 1880, it is said (emphasis ours), p. 117:

"That *regulations promulgated through the Secretary of War are* to be 'received as *the acts of the Executive*,'—see *United States* v. *Eliason*, 16 Peters, 301; *United States* v. *Webster*, Daveis, 59; *United States* v. *Freeman*, 1 Wood. & Minot. 50-1; *Lockington's* Case, Brightly, 288; *McCall's* Case, 5 Philad. 289; *In matter of Spangler*, 11 Mich. 322;—in connection with other authorities noted under SECRETARY OF WAR."

p. 240:

"3. A summary dismissal '*by order of the Secretary of War*,' *is in law the act of the President*. V, 319, XLI, 611. (See SECRETARY OF WAR.)"

pp. 444-445:

"SECRETARY OF WAR.

"It is a fundamental general principle of our public law that all acts done by and directions emanating from the heads of the executive departments in the course of their administrative duties, are in law the acts and directions of the President, in whom is reposed by the Constitution the entire executive power of the government, and whom the heads of departments (except where specially invested by Congress with distinctive authority of their own) simply act for and represent. Thus *all orders made and issued by the Secretary of War in connection with the government and regulation of the military establishment*,—such as orders convening general courts-martial, or approving and directing the execution of the sentences or otherwise acting upon the proceedings of such courts, or mitigating or wholly or partially remitting punishments imposed thereby; or orders summarily dismissing officers, or dropping for desertion, retiring or accepting the resignation of, officers; or orders establishing military reservations, or *promulgating army regulations*, &c.,—*are* to be regarded as *the orders and acts of the President*, whom the Secretary of War represents in the administration of his department; the same being presumed to be made and issued with the knowledge and by the direction of the President, *whether or not he be referred to therein* as having directed or commanded the same; and being equally as valid and operative as if signed by the hand of the President himself. V, 319; IX, 44; XXIII, 654; XXXVII, 650; XXXVIII, 107, 243; XXXIX, 296; XLI, 25, 611; XLII, 209; XLIII, 106."

Later on in their own brief, the respondents themselves point out (p. 34) that (emphasis ours):

> "During the fiscal year 1946 *over 7,500,000 persons were separated from the Army.* * * * *These persons were separated before their terms of service were completed.* See Extension of Service Act. *Authority to order their discharge was granted to separation center commanders* by paragraph 13a of War Department Circular 188, dated June 23, 1945 (see AW 108). At the time of petitioner's discharge there were 21 separation centers in the United States. (Change No. 1 to Appendix 1, War Department Readjustment Regulations, 1-2, January 31, 1946.) Much of the processing for separation of overseas troops was completed before their return to the states (see par. 4, RR1-1, March 18, 1946). * * *" (Under which latter regulation the petitioner in the case at bar was actually discharged. For text of latter regulation, see pp. 3-4 of our earlier "Reply to Respondents' Memorandum.")

It should be noted that said discharge procedures made *no* distinctions whatsoever between those who had *voluntarily "enlisted"* (or had accepted commissions) and those who had *involuntarily* been *"inducted"* ("drafted") into the service and, on the contrary, applied to

"*All* military personnel"

and to

"individual officers and enlisted personnel"

In Dig. Op., JAG, 1912, at pp. 69-70, the entire statement last above quoted is again set forth without change; and the following is also said, p. 1044:

> "**IV** A 1. *An order issued by the War Department directing the muster out of volunteer troops must be regarded as promulgated by authority,* since it can be issued only by authority of the Secretary of War. *Held,* that *such order is a regulation* with reference to the administration of the Army *which the President has the constitutional authority to make, and, as such, it has the force of law.* R. 5, p. 319, Nov. 19, 1863; C. 6980 and 8962, Sept., 1900."

alike and provided for the discharge of all who had "enlisted" or had been "inducted" *except*

> "*those who volunteer for retention on duty* or whose retention is *specifically* authorized by War Department directives." (Emphasis added.)

As this Court probably also recalls, the War Department, from time to time during the years 1945-1946, announced certain

> "critical ASR scores"

which varied with the different ranks and grades and became progressively *lower* as time went on, thus resulting in the gradual and fairly orderly demobilization of the Army.

It should also be noted that, in and by said RR 1-1 the authority of the President and of the Secretary of War to discharge any and

> "*all* military personnel"

was delegated down to those commanders who actually carried out the "demobilization" in the field, they being directed that

> "these regulations will be cited as authority for separation."

These considerations demonstrate fully the *unsoundness* of the respondents' said contention (p. 28) that the petitioner could *not* have been discharged

> "in the absence of a *special* order as provided in AW 108";

and that

> "No such order authorized petitioner's discharge,"

because, were the respondents' said contention to be adopted, *the United States* Government would have been *without power*, after V-J day, *to reduce the size of its armed forces* and would therefore have been *required to*

keep under arms all of its millions of soldiers because *all* persons who so served, whether by

"enlistment," "extension of service" or "induction"

were on active duty under substantially the same provisions respecting the *duration* of their service.

Furthermore, it is also well settled in Army law—

(1) That an honorable discharge, even from a "fraudulent enlistment" (which this was *not*), *cannot* be revoked;[9] (2) That such a discharge *cannot* be revoked, even where issued by mistake;[10] and (3) that such a discharge *cannot* be revoked, even thought the offenses with which he is charged were *not* known at the time of such discharge.[11]

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9. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 455:
"**XV** A 2. An officer secured a commission in the volunteer service *by fraud* and was honorably discharged when his regiment was mustered out. Later, a War Department order was issued which purported to dishonorably discharge him as of the date of his muster out on account of certain irregularities. *Held* that *the order which purported to change the honorable discharge* to a dishonorable one *was inoperative.* C. 9121, Oct. 13, 1900, and Aug. 17, 1906."

even where issued by mistake;[10] and (3) That such a

10. In Dig. Op., JAG, 1912, it is said (emphasis added), pp. 456-457:

"**XV** D 1 a. A soldier was duly discharged pursuant to an order from the War Department. *The order was issued under a misapprehension* in regard to his actual status at the time—*a mistake of fact*—which if discovered would have deferred or prevented the issuing of the order. *Held* that *the mistake of fact did not invalidate the discharge;* that having been duly executed, *it could not be revoked.* P. 61, 421, Sept., 1893; C. 1876, Nov., 1895; 1791, Jan. 2, 1896; 11741, Dec. 11, 1901, and Jan. 20, 1902.

"**XV** D 1 b. Where a soldier, *before the expiration of his term,* received under the fourth article of war a discharge in due form, though charges were then pending against him, the authority ordering the discharge not having been made aware of such charges, *held* that *the discharge was executed and could not be revoked with* a view to bringing the soldier to trial; *that he had, by the discharge, duly become a civilian and was no more than any other civilian under the control of the military authorities.* R. 23, 483, May, 1867; P. 50, 295, Nov., 1891; C. 1791, Jan. 2, 1896; 12342, Apr. 4, 1902."

11. In Op., JAG, 1880, it is said (emphasis added), p. 209:
"*Nor can a person,* who, by reason of acceptance of resig-

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At page 28, the respondents next contend that (emphasis ours):

> **"The long-continued consistent administrative interpretation supports the conclusion that a discharge relates only to the period it purports to cover and does not release a deserter from liability for deserting from a prior unexpired enlistment."**

While the above statement, so far as it goes, may be sound, the *conclusions* which respondents' counsel attempt to draw therefrom are *not*.

In the **first** place, as we have previously demonstrated (*ante*, pp. 7-16) *the petitioner's prior enlistment had in fact expired* by the date he was actually discharged.

In the **second** place, as we have previously demonstrated (*ante*, pp. 5-22), in *any* event, the President and the Secretary of War *could*, as a matter of law, and *did* as a matter of fact, authorize (by RR1-1 and other related "discharge procedures") the discharge of *all* enlisted men (regardless of whether they entered the service by enlistment or induction) provided *only* that they had enough "points" and did not

> "volunteer for retention on duty,"

and the authority so to discharge enlisted men was (by said procedures so promulgated by the Secretary of War) delegated down to those who carried out such discharges in the 21 "separation centers" mentioned by the respondents (p. 34).

In the **third** place, in the case at bar the petitioner's discharge was *not* (as respondents' counsel contend) *limited* to his 1944-1946 draft induction obligation, even though

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nation, dismissal, discharge, &c., has become wholly detached from the military service, *be made liable to trial* by court-martial, for offences committed while in the service, *on the ground that such offences were not discovered till after he had left the army.*" XXVII, 374.

it did, on the reverse side, mention the date of his induction. On the *contrary*, it clearly stated that it was given (R. 39)

> "for the convenience of the Government RR1-1 (Demobilization) (AR 615-365)" (which RR1-1 set up the so-called "point system";

clearly demonstrated, by the statement that the petitioner had

> "ASR SCORE (2 Sep. 45) 44,"

that he was entitled to be so discharged (along with 7,500,000 others); and, in its formal "granting clause," duly signed by a "field officer" (as required by AW 108), discharged him, not merely from his 1944-1946 draft "induction" but

> "from the military service of the United States."

Furthermore, according to Army law, it makes no difference that, as in the case at bar, the "arm" or "service" (viz.: "Infantry" or "Ry. Opn. Bn.", R. 39) is *not* correctly stated on the discharge certificate, and that such a discharge, even though erroneous in that respect, nevertheless *discharges* him, *not* merely from the particular "arm" or "service," but from

> "the service,"[12]

exactly as his certificate expressly here states (R. 39).

12. In Op., JAG, 1918, Vol. 2, it is said (emphasis ours), p. 1033:

"DISCHARGE: *Erroneous Designation of Branch of Service; Effect.*

"An efficiency board found a captain, Coast Artillery Corps, to be incompetent, but recommended that he be continued in the service as a first lieutenant, Quartermaster Corps. Thereafter, on October 25, 1918, he was appointed a captain in the Quartermaster Corps. On November 20, 1918, by direction of the President, he was honorably discharged from the service, under section 9, act of May 18, 1917 (40 Stat. 76, 82). *The discharge described him as 'Captain, C.A.' The order of discharge may have been issued under a mistake of fact, but it is not limited. It clearly discharges him from the service and not merely from the Coast Artillery Corps.*"

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Let us now examine the "authorities" cited by the respondents in support of their said contentions.

Their quotations (pp. 28-29) from the 1928 and 1949 Manuals for Courts-Martial, to the effect that (emphasis ours):

> "A discharge, other than dishonorable, releases only from the particular *contract* and *term of enlistment* to which it relates, and therefore does not terminate *other* subsisting *enlistments* or relieve the soldier from liability to trial by court-martial for an offense committed during such *enlistments*";

from Dig. Op. JAG, 1895, to the effect that (emphasis ours):

> "an honorable discharge was simply a termination of the *particular enlistment* which the soldier was then serving; that it was a discharge only from *that enlistment*, and did not apply to, or discharge from, other *prior unexpired enlistments*, if any, * * * Unlike a dishonorable discharge, * * * an honorable discharge from *one enlistment* does not release the soldier from the consequences of a desertion committed under a *prior enlistment*";

and from Dig. Op., JAG, 1912, to the effect that (emphasis ours):

> "An honorable discharge releases from the particular *contract* and term of *enlistment* to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a *prior* enlistment";

certainly do *not* support the respondents' *conclusion* that the petitioner's 1946 discharge

> "from the military service of the United States" "for the convenience of the Government (Demobilization) RR1-1",

did not discharge him from all subsisting enlistments and inductions.

It should be kept in mind, in considering such authorities,

(1) That they were all written in *peace time; not* during an active war.

(2) That they expressly discuss *only* the effect of a discharge from one *enlistment* upon another *enlistment; not* the effect of a discharge of all soldiers whose "periods of service" had involuntarily "been extended" or who had been involuntarily "inducted" under the draft.

(3) That, as we have previously demonstrated (*ante*, pp. 10-11), in peace time honorable discharges are normally issued only (1) at the expiration of a voluntary "enlistment" period, or (2) by a "purchase" by the soldier prior to the expiration of his "enlistment" period.

It should also be kept in mind that there are, in general, **three** *types of discharges*, (1) The **usual** (honorable) *discharge*, at the expiration of a period of voluntary enlistment (or by purchase); (2) *The* **summary** (honorable) *discharge*, by the President or the Secretary of War (as hereunder RR1-1), prior to the end of a term or "for the convenience of the Government; and (3) the **dishonorable** *discharge* by sentence of a general court-martial.[13]

13. In Op., JAG, 1880, it is said (emphasis added), p. 231:

"**I. Honorable and Dishonorable Discharge Distinguished.**

"1. **Three** *separate forms of discharge* of soldiers are authorized in our law: **1.** *The ordinary regular discharge at the end of the term of enlistment* and by reason of its expiration, and which is necessarily an honorable discharge: **2.** *The summary discharge* authorized by the Fourth Article of War, to be given to a soldier *before his term of enlistment has expired, by the order of the* President, the *Secretary of War*, or a department commander, and which, as these officials cannot *punish*, and are simply invested by the Article with a discretion to cancel a contract when the public interest or convenience requires it, is also an honorable discharge in law: **3.** *The discharge imposed as a punishment by general court martial*, (under the authority of the same Article), and known as 'dishonorable' discharge. XIX, 321; XXXIV, 358; XXXVI, 537; XXXVII, 230; XXXVIII, 342; XLII, 311. (See FOURTH ARTICLE § 3.)"

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As stated by the respondents (pp. 28-29), a "**dishonorable** discharge" does *not* relate to *any* particular contract of *enlistment* but completely separates the soldier from

"the military service."[14]

It should also be noted that, under Army law, *a* **summary** *dismissal,* by the authority of the President (or by the Secretary of War by regulations promulgated by him as head of the department) *prior to the expiration of the term of service,* although "honorable," *is similar to a dishonorable discharge* in that the individual

> "is completely relegated to a *civil* status, having in law no nearer or other relation to the military service than has any civilian who has never been in the army."[15]

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14. In Dig. Op., JAG, 1912, it is said (emphasis ours), p. 462:
"**XXII** B. *A dishonorable discharge* does not relate to any particular contract or term of enlistment; it *is a discharge from the military service* as a punishment—a complete expulsion from the Army *and covers all unexpired enlistments.* A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in the sixtieth article of war. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. P. 53, 46, 179, Apr., 1892; 55, 165, Aug., 1892; 59, 55, 86, Apr., 1893; C. 3585, Nov., 1897; 7614, Jan. 25, 1900; 13579, Nov. 3, 1902; 24658, Mar. 14, 1909."

15. In Op., JAG, 1880, it is said (emphasis added), pp. 239-240:
"1. *Dismissal by executive order* is quite distinct from dismissal by sentence. The latter is a *punishment:* the former is *removal from office.* The power to dismiss, which, as being an incident to the power to *appoint* public officers, had been regarded since 1789 as vested in the President by the Constitution, was, for the first time in 1866, (by the Act of July 13th of that year, re-enacted in the second clause of the present 99th Article of War and in Sec. 1229, Rev. Sts.,) expressly divested by Congress, in so far as respects its exercise in time of peace. By the statute law it is now authorized only in time of war. *During the late war it was exercised in a great number of cases,* sometimes for the purpose of sum-

The petitioner's quotation (pp. 29-30) from Dig. Op. JAG, 1912-40, p. 381, is distinguished from the case at bar by the fact that, although it involved a drafted inductee, he was not (in 1919) discharged

> "from the military service of the United States" "for the convenience of the Government"

under the "point system" as was the petitioner here.

The *Case of Taylor*, CM 336336 (not reported) in which, say the respondents (p. 30),

> "the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a *subsequent enlistment*,"

does *not* support the respondents' conclusions. In the *first* place, I am advised by a letter from the Office of the Judge Advocate General, dated 25 September 1951, that this soldier's discharge, in 1947, was from a subsequent December 12, 1945 (so that he did not come within the

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marily ridding the service of unworthy officers, *sometimes in the form of a discharge or muster-out of officers, whose services were simply no longer required.* The distinction between this species of dismissal and dismissal by sentence is illustrated by the fact that the former has, with the sanction of legal authority, been repeatedly ordered in cases where a court martial has previously *acquitted* the officer of the very offences on account of which the summary action has been resorted to. XXIII, 265; XXVI, 5; XXXI, 557; XXIX, 251; XLII, 470."

P. 241:

"8. There can be no *revocation* of a duly executed order of dismissal, however unmerited or injudicious the original act may be deemed to have been. *For distinct as dismissal by order is,* in its *nature,* from dismissal by sentence, (see § 1, *supra,*) *the effect* of the proceeding in divesting the office *is the same* in each case. *An officer dismissed by an order,* though his dismissal may have involved no disgrace, *is assimilated to an officer dismissed by sentence,* (see DISMISSAL, I § 6), *in so far that he is completely relegated to a civil status,* having in law no nearer or other relation to the military service than has any civilian who has never been in the army. * * *"

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scope of the "point system") *"enlistment"* and that his subsequent discharge from said *"enlistment"* was *not* under the so-called "point system" (RR1-1). In the *second* place, the opinion (of which I have a copy) merely says that

> "The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence,"

and does *not* indicate that the Board knew of or even considered the issue here before this Court.

Hence, even under the Army's own "administrative interpretation," the petitioner's 1946 discharge

> "from the military service of the United States" "for the convenience of the Government"

discharged him from all subsisting enlistments and inductions and made him a civilian, no longer subject to trial by court-martial for desertion, or any other offense not specified under AW 94.

At page 31, the respondents attempt to distinguish the *Drainer* case (*Ex parte Drainer*, 65 F. Supp. 410, affirmed *sub. nom. Gould* v. *Drainer*, 158 F. 2d 981 (C. A. 9) on the ground that (emphasis ours):

> "The Articles for the Government of the Navy, *as distinguished from AW 107, did not make mandatory the serving of time lost in desertion*, nor did they *prohibit a discharge prior to the end of the term, as is the case under AW 108.*"

Both of these statements are absolutely untrue and the *Drainer* case is *not* to be distinguished thereby. As we have previously demonstrated (*ante*, pp. 5-8), **AW 107 does not make mandatory the serving of time lost in desertion**, and, on the contrary, the *"liability"* to be required so to serve can be and was here *waived* by the 1946

discharge; **and**, as we have also previously demonstrated (*ante*, pp. 17-22), **AW 108 does not prohibit a discharge prior to the end of a term**, and, on the contrary, such discharges *can be* and *were* (to the extent of some 7,500,000 men in 1946) issued by some 21 separation centers under discharge procedures (RR1-1, the "point system")promulgated by the Secretary of War.

At pages 31-32, respondents' counsel go on to say

> "that Congress has now adopted for the entire military service the Army's interpretation of the effect of a discharge. Subdivision (c) of Article 3 of the new Uniform Code of Military Justice (64 Stat. 109; 50 U. S. C. Supp. IV, 553 (c)) provides that 'Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.' This provision was prompted by *Ex parte Drainer*, House Report No. 491, 81st Congress, 1st sess., April 28, 1949, p. 12."

There are several obvious *flaws* in this contention. In the **first** place, the language quoted (viz: "separation from a *subsequent* period of service") would *not* support the respondents' contention here because, as we have heretofore demonstrated (*ante*, pp. 24, 29-30), the 1946 discharge was *not* merely from the subsequent 1944-46 "period of service," but was from

> "the military service of the United States"

with the intention of reducing the size of the army (by some 7,500,000 men), *regardless* of the type or length of their "periods of service,"

> "for the convenience of the Government."

In the **second** place, as is pointed out in 50 American Jurisprudence, "Statutes," § 275, at page 202:

> "* * * The general rule is that a change in

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> phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different, * * *."

In the **third** place, the said Uniform Code of Military Justice is, by its very terms, *not* applicable to offenses occurring *before* May 31, 1951 (50 U. S. C. A., 1950, § 551).

At pages 33-34, respondents' counsel attacks our contention—that the petitioner has been discharged from all subsisting enlistments and inductions—on the ground that (emphasis ours):

> "It would permit a wartime deserter, who has committed a *heinous* offense, * * * to escape prosecution by committing another wrongful act, fraudulently *enlisting* without revealing his prior enlistment."

In the **first** place, as we have previously demonstrated (*ante*, pp. 8-12), since he was "inducted" under the draft he did *not* "fraudulently *enlist*."

In the **second** place, once so inducted, he served honorably and well, as is indicated by his promotion to a sergeant, by his being awarded the Good Conduct, Occupation and Victory medals and the European, African and Middle Eastern Theatre ribbons, with Bronze Battle Star (R. 39), and by his being given an "honorable discharge" after 21 months service overseas.

In the **third** place, the use of the word "*heinous*" in referring to a desertion in the Continental United States before any indication that he had been scheduled for shipment overseas, particularly by a married man with a wife, a daughter and a grandchild, shows either ignorance or

disregard for well-established Army law to the effect that desertion does *not*

"affix an irreparable taint upon his status"

or

"preclude his receiving an honorable discharge"

after subsequent honorable and faithful service.[16]

The respondents' argument (pp. 34-36) to the effect that a ruling in favor of our contention that the petitioner's 1946 discharge discharged him from all subsisting enlistments and inductions

> "would be particularly unrealistic in the light of the practical situation confronting the Army after the termination of hostilities in World War II,"

is *not* at all convincing and, if anything, establishes *our* contention.

It certainly clearly demonstrates

(1) That, upon the conclusion of such hostilities, the Army had in its service some 7,500,000 men whose

16. In Op., JAG, 1880, it is said (emphasis ours), p. 226:

"11. That *desertion per se does not so taint the record of a soldier as to disqualify him to receive a final honorable discharge*, or to enjoy the rights to pay and bounty incident upon such a discharge, is now fully and finally settled. (See BOUNTY § 5; DISCHARGE § 6.)"

P. 233:

"6. *The fact that a soldier has been a deserter does not affix an irreparable taint upon his status* or service when returned from desertion, *or preclude his receiving an honorable discharge*, if either he be restored to duty without trial, or having been tried and sentenced, he yet, by reason of his imprisonment being fully executed or being remitted before the end of his term, is returned to duty and is in the performance of faithful service when his term is completed. *A discharge in the usual form then given to him is a formal final judgment passed by the government upon his entire military record* and an authoritative declaration by it that he leaves the military service in a status of honor. Thus honorably discharged he cannot, by reason of his having formerly deserted, be deprived of any rights to pay, allowances or bounty usually incident upon honorable discharge. XXVI, 484."

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"periods of service" (under "enlistments," "extensions of service" or the draft) had *not* expired.

(2) That, "for the convenience of the Government," it had to discharge them promptly from the service, *without regard* to whether their being in the service was the result of unexpired "enlistments," "extensions of service" or draft "inductions," and *without regard* to whether or not they had "bad time" which they were *"liable"* to serve out under AW 107.

(3) That such discharges, even before their "periods of service" had expired, were fully authorized by "discharge procedures" promulgated by the Secretary of War for the President under AW 108.

(4) That such men were discharged "for the convenience of the Government" under such "discharge procedures" as their "ASR scores" were reached.

(5) That the petitioner here was so discharged when "ASR score 44" was reached.

The attempt of respondents' counsel to avoid the obvious effect of this situation by claiming that (p. 35)

> "The only effective method of discovering deserters is by means of fingerprints,"

is *not* at all convincing.

The petitioner always used the same name, "William H. Giese," was inducted in 1944 at his home town (Champaign, Illinois) and certainly had the same fingerprints at all times. Why the Army could not have checked them between early 1944 (when he was inducted) and June, 1946 (when he was discharged) does not appear.

Furthermore, as we have previously demonstrated (*ante*, p. 22), a discharge, even under an erroneous conception of the facts, is entirely valid and cannot, as a matter of Army law, be revoked or modified.

The statement of respondents' counsel (pp. 35-36) that (emphasis ours):

"In this respect it should be noted that petitioner's

> contention is that his honorable discharge, *not his subsequent military service,* terminated military jurisdiction and in effect pardoned the desertion,"

is *not* correct. We *do* contend that his subsequent 1944-1946 military service, which was faithful and honorable *did* complete his full 3-year, 1930, "enlistment period," thus giving to his country the full 3 years' service he had contracted to give (when a young man, not a grandfather, as now).

Respondents' concluding contentions (p. 36) that to sustain our contention would also

> "be a contradiction of the rule that enlistment is a contract,"

and

> "would thwart the clear intent of Congress that soldiers should not be permitted to evade their enlistment obligations by deserting,"

is *not* at all convincing when it is remembered that, as we have previously demonstrated (*ante*, pp. 15-16), giving the petitioner credit only for his "good" time, he had actually served out his full 3-year, 1930 "enlistment contract" in full and, in so doing, did so well that he was promoted to Sergeant, received the decorations heretofore mentioned, and, after 21 months service overseas, received his "honorable discharge"

> "from the military service of the United States."

We therefore submit that the issuance, during the general demobilization of 1946, of a discharge, "for the convenience of the Government" under "RR1-1" (the "point system"), certifying that this petitioner was thereby

> "honorably discharged from the military service of the United States,"

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discharged him from *all* subsisting enlistments and inductions and made him a *civilian,* no longer subject to trial by court-martial for desertion or any other offense not specified under Article of War 94.

II.

BY VIRTUE OF HIS CIVILIAN STATUS FOLLOWING HIS 1946 DISCHARGE "FROM THE MILITARY SERVICE OF THE UNITED STATES," THE PETITIONER WAS NOT REQUIRED TO EXHAUST SUCH "ADMINISTRATIVE REVIEW PROCEDURES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER THE ARTICLES OF WAR BEFORE RESORTING TO HABEAS CORPUS.

In answer to this proposition in our original petition (pp. 29-34), the respondents contend (pp. 11-23) that

> **"The Resort to Habeas Corpus Is Premature, Since the Military Procedures Have Not Been Completed."**

Their **first** statement under this contention is (p. 11) that (emphasis ours):

> "In *Gusik* v. *Schilder,* 340 U. S. 128, this Court held that resort to habeas corpus *by a person detained under sentence of a court-martial* is premature if the petition is filed before all the available procedures prescribed in the Articles of War, including the remedy of a motion for a new trial under AW 53 have been exhausted."

As we pointed out in our original petition (pp. 31-32), the said *Gusik* case did *not* involve a veteran who had received an "honorable discharge" prior to his trial by court-martial. On the *contrary,* he was *still* on *active duty* with the United States Army in Italy at the time of his

arrest, trial and conviction by court-martial for murder, and his *only* contentions were (1) that no thorough and impartial pre-trial investigation had been made; (2) that the Trial Judge Advocate had failed to call material witnesses; and (3) that he had been denied the assistance of effective counsel. Hence the *Gusik* case does *not* (as respondents contend) hold that *any* person

"detained under sentence of a court-martial"

must first exhaust all military remedies before resorting to habeas corpus. It merely holds that *army personnel still on active duty* at the time of their trial and conviction *must do so.* Furthermore, the question presented in the case at bar (*viz:* whether a *former* soldier, who has been *discharged* before his trial and had thus become a *civilian,* must do so) was neither involved nor discussed by this Court. Hence the *Gusik* case is *not* applicable and does *not* support the respondents' contention.

Apparently recognizing that their said opening statement goes *too* far, the respondents concede (pp. 12-13, 14, 15, 18) (emphasis ours) that:

> "It is recognized that the *exhaustion* of the *review procedures* provided by the authority which is depriving the prisoner of his liberty *is not a jurisdictional prerequisite of habeas corpus, and that* in appropriate cases *the federal courts retain the discretion to grant the writ even where an appeal has not been taken. Bowen* v. *Johnston,* 306 U. S. 19. The federal courts have adopted this self-imposed limitation on the grant of the writ in order to promote the orderly administration of justice by discouraging the use of habeas corpus as a substitute for ordinary administrative and review procedures. * * *.
>
> "Compare *Ohio* v. *Thomas,* 173 U. S. 276 (holding that the court would take jurisdiction of a habeas corpus proceeding to release a federal officer held for trial by a state); *In re Neagle,* 135 U. S. 1.

"We do not present these arguments as technical limitations on the district court's *discretion* to grant the writ. * * *."

We fully agree with the respondents' statement that:

"exhaustion of review procedures is *not* a jurisdictional prerequisite to habeas corpus."

After making this concession, the respondents go on to contend (pp. 13-14, 15, 16), however, that (emphasis ours):

"This case is not one in which an exception should be made to the general rule. Assuming, for the sake of the argument, that the petitioner can eventually establish on the merits that he is entitled to his freedom, nevertheless this case is still not an appropriate one for the grant of habeas corpus prior to the completion of the regular military procedures.

"The petitioner relies principally on the argument that he was a civilian at the time of his arrest, trial, and conviction, and was therefore not subject to the authority of the particular court-martial or of any other court-martial. He bases his argument upon the honorable discharge which was given him in 1946, which, it is contended, relieved him entirely from subjection to military law. In meeting this argument, it is not necessary to take the position that habeas corpus should not be allowed in a situation where the military authorities attempt to reach out into the civilian population and assume authority over an individual who is not and never has been subject to military justice. (*cf. Billings* v. *Truesdell*, 321 U. S. 542. * * *.

* * * * *

"Here, on the other hand, stated in terms most favorable to the petitioner, *a very real question of jurisdiction exists*, since the honorable discharge on which he relies relates specifically to his term of service from 1944 to 1946, and makes no specific reference to releasing him from service for any earlier period or terminating his liabilities for any prior derelictions. We shall argue in Point II of this brief

that the action of the court-martial was entirely legal and proper; for the present, it suffices to point out that, whatever the ultimate disposition of the case on the merits, *the assertion of jurisdiction* by the court-martial *does not appear to have been arbitrary* or without color of law.

"Since the action of the court-martial was *not on its face arbitrary*, petitioner's argument comes down to the proposition that because the issue he raises is one which challenges the ultimate jurisdiction of the military authorities to hold and try him, he is now entitled to have that issue determined by the civil courts rather than awaiting the final determination of the military courts."

The respondents' said contention—that lack of jurisdiction of a military court-martial over a civilian is not, prior to the completion of Army review procedures, a ground for release on a writ of habeas corpus where the question of its jurisdiction is "*debatable*"—is demolished by the very case above cited by the respondents. In that case (*Billings* v. *General Truesdale*), the petitioner, a "conscientious objector", was ordered by his draft board to report for induction, actually reported to the Army's induction center at Ft. Leavenworth, Kansas, spent the night there in the Army's barracks, had Army "chow", took Army physical and mental examinations and was read the oath of induction by an Army officer and, on his refusal to take said oath, was told by said officer that his refusal made no difference and that "you are in the Army now". When he refused to submit to being finger-printed, he was arrested and tried and convicted by court-martial. Although the question of jurisdiction of the court-martial was so "*debatable*" that Mr. Justice Douglas, who is noted for his short and concise opinions, took some sixteen pages to dispose of the issue and one Justice dissented, this Court, *without requiring him to exhaust any military re-*

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view procedures, reversed the lower courts' rulings discharging the writ of habeas corpus.

At pages 16-17, the respondents go on to say that:

> "To make sense of the petitioner's argument, it must be limited to jurisdiction *in personam;* that is, to situations where the petitioner is asserted not to be one of the class over which the imprisoning court has power. *There seems to be no logical basis for arguing that lack of jurisdiction in personam should be considered a more fundamental error than lack of jurisdiction for any other reason.* An unconstitutional statute used as a basis for depriving a man of his liberty would seem as serious a defect as lack of jurisdiction over the person. But it has been held that the issue of constitutionality does not justify the grant of habeas corpus prior to exhaustion of appellate procedures. *Henry* v. *Henkel*, 235 U. S. 210; *Ex parte Royall*, 117 U. S. 241. *Cf. In re Lancaster*, 137 U. S. 393. Similarly, to deprive a man of his liberty under a misconstruction of a statute, so that in the end it will be found that he did not commit any crime at all, seems to be as serious an infringement of his constitutional rights. *Sunal* v. *Large*, 332, U. S. 174."

Contrary to the assumption of the respondents, there is a very fundamental and well established difference (insofar as requiring the "exhaustion" of "administrative," or even "judicial," "review procedures" is concerned) **between an original and continuing lack of jurisdiction over the person or of the subject matter, on the one hand, and other bases for habeas corpus** (such as a *loss* of jurisdiction due to the denial of "due process" during the trial, or a misconstruction of a statute, or an unconstitutional statute), **on the other; particularly in cases where a civilian is tried by a court-martial, which is a tribunal of extremely limited jurisdiction.**

In *State of Ohio* v. *Thomas*, 173 U. S. 276, 19 S. Ct. 453 (1899), cited by respondents (p. 15), the petitioner,

Governor of a Federal soldier's home in Ohio, was arrested on a charge of violating a State law prohibiting the use of oleomargarine and was taken before a justice of the peace. After his contention, that as a Federal officer he was not liable to trial in State courts, had been denied, he consented to trial without a jury and was tried, convicted and fined $50, he to be imprisoned if it be not paid. He refused to pay it, and *without appealing*, resorted to habeas corpus in a Federal court on the ground that the State had no jurisdiction to try him.

In *affirming* that ruling, this Court, speaking through Mr. Justice Peckham, said:

> "Under the facts herein the state court had no jurisdiction to try the appellee for the offense charged in the written complaint made to the magistrate. See authorities cited in *Re Waite*, 81 Fed. 359.
>
> * * * * *
>
> "Some of the same authorities also show that this is one of the cases where it is proper to issue a writ of habeas corpus from the federal court, instead of awaiting the slow process of a writ of error from this court to the highest court of the state where a decision could be had. * * *"

In *Cunningham* v. *Neagle* (*In re Neagle*), 135 U. S. 1, 10 S. Ct. 658 (1890), also cited by respondents (p. 15), Neagle, a Deputy United States Marshal, who had been appointed for the purpose of protecting Mr. Justice Field of this Court while sitting as a Circuit Judge in California against injury repeatedly threatened by Mr. and Mrs. Terry, disgruntled litigants, shot and killed Mr. Terry while he and his wife were actually attacking Mr. Justice Field. Upon his arrest by a California sheriff on a charge of murdering Terry, Neagle resorted to habeas corpus in a Federal Circuit Court and was ordered discharged from the custody of the California sheriff on the ground that,

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as a Federal officer in the performance of his duty, he was not subject to trial in the California courts.

In *affirming* his discharge, this Court *without requiring him to stand trial in California and appeal*, concluded that:

> "He was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction."

Sunal v. *Large*, 332 U. S. 174, 67 S. Ct. 1588 (1947), repeatedly cited by the respondents (pp. 13, 17, 22) does *not* sustain the respondents' position. There the petitioners, Jehovah's Witnesses, who claimed to be exempt from the draft as ordained ministers, were tried in the Federal courts for refusing to submit to induction. The trial courts, following many similar rulings by other courts, had refused to permit them to introduce evidence attacking the draft board's classification and they had been convicted and sentenced to prison. After their time to appeal had expired, this Court (in another case) had held that such classification *could* be challenged in the trial courts, and the petitioners then sought their release on writs of habeas corpus, which were denied.

In upholding those denials, this Court (in a 6-3 decision written by Mr. Justice Douglas) at pages 179, 181, made it clear that the *error during the trial* was *not jurisdictional* when he said:

> "• • • It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, *and other errors in trial procedure which do not cross the jurisdictional line. Cf. Craig* v. *Hecht*, 236 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293.
>
> • • • • •

> "* * * *The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law* in excluding the defense which was tendered. *That error did not go to the jurisdiction of the trial court.* * * *." (Emphasis added.)

Nor does *Henry* v. *Henkel*, 235 U. S. 210, also cited by respondents (pp. 8, 14, 16), support their position. He did *not* dispute jurisdiction over his *person* but, on the contrary, alleged: (1) that the Congressional resolutions did not justify the questions which he had refused to answer; (2) that the facts alleged did not constitute an offense; and (3) that, if they did, the statute was unconstitutional. Furthermore this Court merely *affirmed* the trial court's exercise of its *discretion* in *denying* the writ. In the case at bar, Judge Igoe, in *his discretion, granted* the writ and *discharged* the petitioner.

The case of *Ex parte Royall*, 117 U. S. 241, cited by the respondents (p. 17), likewise does *not* support such a contention. There the petitioner was in custody under an indictment charging that he had, in violation of a Virginia statute (making it a crime to sell a coupon clipped from one of that State's bonds without paying a license fee of $1,000 plus a tax of 20% of the face value of such coupon) which he contended was unconstitutional and void. He resorted to habeas corpus on that ground and the Federal Circuit Court dismissed his petition. He did *not* challenge the court's jurisdiction over his *person*.

In *affirming* that ruling, on the ground that the trial court had not abused its *discretion*, this Court, through Mr. Justice Harlan, said (emphasis ours):

> "* * * Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the state officials in advance of his trial in the state court?

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> We are of opinion that *while the circuit court has the power to do so, and may discharge the accused in advance of his trial* if he is restrained of his liberty in violation of the national constitution, *it is not bound in every case to exercise such a power immediately upon application being made for the writ.*
> • • •
>
> "As it does not appear that the circuit court might not, *in its discretion* and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his application to that court at some future time should the circumstances render it proper to do so. Affirmed."

In the case at bar, as we have said, Judge Igoe in his *discretion, discharged* the petitioner on the writ.

In *In re Lancaster,* 137 U. S. 393, also cited by respondents (p. 17), another case where the petitioner did *not* challenge the court's jurisdiction over his *person,* the full opinion is as follows:

> "The petitioners were indicted under sections 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the circuit court for the southern district of Georgia, and have been taken into custody. They have not invoked the action of the circuit court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus, upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States, or cognizable in the circuit court, and that for other reasons the indictment cannot be sustained. In this posture of the case we must decline to interfere. The application for leave to file the petition is denied."

The respondents also say (p. 12) that:

> "The *Gusik* decision does not, of course, expound a

> new doctrine (see, *e. g.*, *Mooney* v. *Holohan*, 294 U. S. 103, *Ex parte Hawk*, 321 U. S. 114); its particular significance in this case is that it applies a well-established policy to military procedures and to the specific remedy provided by AW53."

This, likewise, is *not* correct. *Mooney* did not contend that he was not *personally* subject to trial by the State of California for murder. He contended only that the court had *lost* jurisdiction *during* the trial because he had been denied "due process of law" during his trial in that the State's prosecuting officials had deliberately used perjured evidence to convict him; but he had never given the California courts an opportunity to pass on the question by habeas corpus. *Hawk* likewise did *not* contend that he was not *personally* subject to trial by the State of Nebraska for murder. Like *Mooney*, he contended that the court had *lost* jurisdiction during the trial because the State's prosecuting officials had deliberately used perjured evidence to convict him; plus a contention that, by too prompt a trial, he had been denied the effective assistance of counsel; but he had not given the Nebraska trial courts an opportunity to pass on the question by habeas corpus or *quorum nobis*. Hence *neither* the *Mooney* nor *Hawk* case supports the respondents' contention here.

At page 16, the respondents also say (regarding our position on *original lack* of *jurisdiction* over the *person*) that:

> "If this argument is based on lack of jurisdiction as such, it is fallacious, since *the ultimate ground for all habeas corpus proceedings is lack of jurisdiction* in the persons depriving the petitioner of his liberty. See *Whelchel* v. *McDonald*, 340 U. S. 122, 126. Therefore, in every case where there is a sound basis for seeking habeas corpus there would be no room for requiring the exhaustion of appellate procedures. Petitioner's argument would eliminate in its entirety the procedure of requiring that appeals be completed."

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This is *not* a correct statement of the law or of our contention and the *Whelchel* case does *not* so hold.

As is stated by Mr. Justice Douglas, in a footnote to *Sunal* v. *Large*, 332 U. S. 174, 67 S. Ct. 1588, at page 183,

> "The remedy of habeas corpus extends to a case where a person is in custody in violation of the Constitution or a law * * * of the United States: R. S. § 753, 28 U. S. C. § 453."

As was said by Mr. Chief Justice Hughes, in *Bowen* v. *Johnston*, 306 U. S. 19, cited by the respondents at p. 12, although a tribunal may *originally* have jurisdiction of both the person and of the offense charged, *if*

> "*in its proceedings his constitutional rights have been denied*, the remedy of habeas corpus is available." (Citing some 8 earlier Supreme Court cases) (emphasis ours).

That was the type of situation presented in the *Mooney*, *Hawk* and *Gusik* cases cited by the respondents and previously discussed by us, in which *loss* (during the trial), not *original lack, of jurisdiction* must often be decided by "review procedures" *before* resorting to habeas corpus, but that is *not* the situation (*original* and continuing *lack* of *jurisdiction over the person and the offense*) presented by the case at bar.

Furthermore, the situation in the *Whelchel* case was the *same*, viz: the accused *conceded* that he was *still* in the Army and was subject to its jurisdiction (in fact he had *never* been discharged at all) and, in the words of Mr. Justice Douglas, merely contended that:

> "the military tribunal which tried petitioner was *deprived* of jurisdiction *by reason of the treatment of the insanity issue* tendered by petitioner. We hold that it was not." (Emphasis ours.)

At pages 17-18, the respondents cite and quote from

Mr. Justice Holmes' language in *United States* v. *Sing Tuck*, 194 U. S. 161, 24 S. Ct. 622 (1904), for the proposition that petitions for writs of habeas corpus which are based on a lack of jurisdiction over their *person* are treated *no* differently than those alleging that they had not committed a crime because the statute involved had been misconstrued. Such is ***not*** the correct construction of that decision. In the **first** place, the Chinese involved had been seized while attempting to enter this country from Canada and had refused to give any information whatsoever except their names and merely contended, without giving any facts or details, that they were American citizens by birth. Referring to this refusal, Justice Holmes said:

> "Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage,"

and, went on to say that:

> "we agree with the court of appeals that a petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough."

But the **real** key to the decision is the unquoted balance of the same paragraph partially quoted by the respondents, viz:

> "* * * In *Gonzales* v. *Williams*, 192 U. S. 1, *ante*, p. 177, 24 Sup. Ct. Rep. 177, *there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts, but merely a question of law.* Here the issue, if there is one, is a pure matter of fact,—a claim of citizenship and in a form naturally raising a suspicion of fraud." (Emphasis ours.)

In *Gonzales* v. *Williams*, 192 U. S. 1, 24 S. Ct. 177 (1904), above cited and distinguished by Justice Holmes, Miss

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Gonzales, a native of Puerto Rico, had, after its becoming a "possession of the United States" after the war with Spain, come to the port of New York where the Commissioner of Immigration prevented her from landing and detained her as an "alien immigrant". In *reversing* a Circuit Court order dismissing the writ of habeas corpus, this Court, through Mr. Chief Justice Fuller, had said:

> "We think it clear that * * * citizens of Puerto Rico, whose permanent allegiance is due to the United States, * * * are not 'aliens' and upon their arrival by water at ports of our mainland, are not 'alien immigrants', within the intent and meaning of the act of 1891.
>
> * * * * *
>
> "And in the present case, as Gonzales did not come within the act of 1891, *the commissioner had no jurisdiction to detain her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary.*" (Emphasis added.)

That even Mr. Justice Holmes so regarded his holding is shown by his subsequent statement, in *United States* v. *Ju Joy*, 198 U. S. 201, 25 S. Ct. 645, that:

> "* * * the first of them is answered by the case of *United States* v. *Sing Tuck*, 194 U. S. 161, 170, 48 L. Ed. 917, 921, 24 Sup. Ct. Rep. 621: 'A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out a prima facie case'."

This same general view of the case was taken by Mr. Justice Brandeis, in *United States* v. *Tod*, 263 U. S. 153, 44 S. Ct. 56, when he said, at pages 152-153, that:

> "If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *Ng Fung Ho* v. *White*, 259 U. S. 276, 281, 42 Sup. Ct.

492, *66 L. Ed. 938. But he made* no such claim at the time; nor does he now contend, by allegation in his petition for habeas corpus, or otherwise, that he is a citizen of the United States. * * *"

* * * * *

"It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. *United States* v. *Sing Tuck*, 194 U. S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917. * * *"

Somewhat this same view is expressed in *Kessler* v. *Strecker*, 307 U. S. 35, 59 S. Ct. 700 (argued by Justices Jackson and Murphy, as Solicitor and Attorney General, respectively), where Mr. Justice Roberts, at pages 34-35, said:

"Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department and supports it by substantial evidence, is he entitled to a trial *de novo* in the district court. *United States* v. *Sing Tuck*, 194 U. S. 191, * * *."

Another rather recent case referring to the *Sing Tuck* case and "highlighting" its statement that, where the issue is merely one of *law*, *not* of *fact*, administrative appeal procedures need *not* first be exhausted before resorting to habeas corpus, is *United States* v. *Watkins*, 163 F. 2d 382 (1947), where Judge Swan, at page 330, in *reversing* an order dismissing the writ, said:

"In *United States* v. *Sing Tuck*, 194 U. S. 161, * * *, a Chinese, who claimed to be a United States citizen sued out a writ of habeas corpus without having appealed to the Secretary of Commerce and Labor from the administrative order of exclusion. The writ was dismissed on the ground that the relator had not exhausted his administrative remedy; and Justice Holmes said of the *Gonzales* case, '*there was no use in delaying the issuance of the writ until an appeal had been taken because there was no dispute about the facts, but merely a question of law.' The undisputed facts raise*

> *a question of law as to whether the relator was an alien immigrant. If that question is answered in his favor, his failure to take an appeal to the Attorney General should not be fatal to his claim.*" (Emphasis added.)

In this connection, it should be noted that in the case at bar (*Giese* v. *Chamberlin*) there is *no* real issue of *fact* to be determined by the Judge Advocate General on a motion for a new trial under A. W. 53, but only a question of *law*, viz: the *effect* of Giese's 1946 honorable discharge

> "from the military service of the United States" "for the convenience of the Government" "under R. R. 1-1" the "point system."

Hence, *even* had this case *not* involved the trial of a *civilian* by a court-martial having *no jurisdiction* over his *person* (which this case *does*), **in the words of Justice Holmes, there would here still be**

> **"no use in delaying the execution of the writ because there is no dispute about the facts, but merely a question of law."**

As we have indicated **the distinction between cases involving on original lack of jurisdiction over the person of the accused, on the one hand, and other grounds for resorting to habeas corpus, on the other hand, is peculiarly forceful and clean-cut in the case of a civilian tried by a court-martial; and the cases uniformly hold that such an individual, over whom such a tribunal has no personal jurisdiction, may be freed on a writ of habeas corpus without first exhausting any so-called "administrative review procedures."**

This is probably greatly influenced by the Fourth Amendment to the Constitution of the United States, which, in pertinent part, provides that:

> "No person shall be held to answer for a *capital*, or other infamous crime, unless on a presentment or in-

dictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; * * *."

Since, by A W 58 (10 U. S. C. 1530), desertion, "in time of war", is expressly punishable by "*death* or such other punishment as a court-martial may direct", it is obviously a "*capital*" crime and as such is within the purview of the said IVth Amendment.

In *Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935 (1885), in releasing the prisoner on a writ of habeas corpus, *without first requiring an appeal*, this Court said:

"* * * our judgment is that a crime punished by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment of the constitution; and that the *district court, in holding the petitioner to answer for such a crime*, and sentencing him to such imprisonment, *without indictment or presentment by a grand jury exceeded its jurisdiction*, and he is therefore entitled to be discharged." (Emphasis ours.)

In the early case of *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650 (1830) Mr. Chief Justice Marshall (in referring to the still earlier case of *Wise* v. *Withers*, 3 Cranch 330), at page 209, said that (in the *Wise* case):

"* * * This court reversed the judgment of the Circuit Court, because *a court-martial had no jurisdiction over a person not belonging to the militia*, and its sentence in such a case being *coram non judice*, furnishes no protection to the officer who executes it.

"This decision proves only that *a court-martial was considered as one of those courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record.* * * *" (Emphasis added.)

In *Duncan* v. *Kahanamoku*, 327 U. S. 304, 66 S. Ct. 606

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(1946), certain *civilians* had been tried by military tribunals in Hawaii after the attack on Pearl Harbor and had been convicted and imprisoned. In *reversing* a Circuit Court decision which would have remanded them to military custody, this Court, speaking through Mr. Justice Black, at pages 307, 322-323, said:

> "* * * Both of these cases thus involve the rights of *individuals* charged with crime and *not connected with the armed forces* to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of those safeguards. * * *"
>
> * * * * *
>
> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin, supra,* 317 U. S. at page 19, 63 S. Ct. at page 6, 87 L. Ed. 3. *Our system of government is clearly the antithesis of total military rule.* * * *. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.
>
> "*Military tribunals have no such standing.* For as this Court has said before: '* * * *the military should always be kept in subjection to the laws of the country* to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that *the law alone shall govern; and to it the military must always yield.*' *Dow* v. *Johnson,* 100 U. S. 158, 169, 25 L. Ed. 623. * * *." (Emphasis ours.)

It should also be recalled that in *United States, ex rel., Hirshberg* v. *Cooke,* 336 U. S*. 210, 69 S. Ct. 530 (1949), cited and discussed at length in our original petition (pp. 22-28) where an individual, who had been given an honorable discharge from the Navy one day and had reinlisted the next, had been tried and convicted by court-martial for an offense committed in the earlier enlistment, this Court *reversed* a lower court ruling discharging the writ,

without requiring him first to exhaust any naval "review procedures".

It should also be noted that in the *Drainer* case (65 F. Supp. 410, aff., 158 F. 2d 981), cited and discussed at length in our original petition (p. 18-20), which has often been cited with approval by other courts (id. pp. 20-28), where a Marine was given an honorable discharge and later was tried and convicted by court-martial for an offense under an *earlier* enlistment, the court *discharged* him on a writ of habeas corpus, *without requiring him first to exhaust any "administrative procedures".*

Each of the *three* other cases cited and discussed at length in our original petition (pp. 14-18, viz: *United States, ex rel. Sanantonio* v. *Warden*, 265 F. 787; *United States ex rel. Viscardi* v. *MacDonald*, 265 F. 695; and *Ex parte Wilson*, 33 F. 2d 215), involved an individual who had been in the service and had been discharged *before* his trial by court-martial and yet, in each of said cases, the petitioner was discharged, *without requiring him to exhaust any "administrative review procedures".* It should also be kept in mind that those courts recognized (in the said *Viscardi* case)

> "the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and (in the *Wilson* case) that a

> "person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil court for relief from arrest and trial • • • by a court-martial."

We submit that, **as the result of the above cases, it is crystal clear that,** insofar as requiring a petitioner first to exhaust either "administrative", or "judicial", "review procedures" before resorting to habeas corpus is con-

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cerned, **a lack of original jurisdiction over the person of the accused is very different from other defects**; and that this is *particularly true* where, as in the case at bar, a *civilian* is tried by a court-martial, which is a tribunal of extremely *limited* jurisdiction. **These same cases also fully establish** our basic contention under this point, *viz.*: **that a civilian tried by a court-martial having no jurisdiction over his person, is entitled to his release on habeas corpus without having first exhausted any Army "administrative review procedures."**

At page 21, the respondents go on to contend that:

> "* * * It appears particularly inappropriate that, having submitted this issue to the military authorities, petitioner should now be entitled to grant of habeas corpus without exhausting the procedures which he has already sought to utilize. * * *"

If this is intended to be a disguised contention that a *civilian*, by submitting to trial by a court-martial, *may waive* its utter *lack* of *jurisdiction* over his *person*, it is absolutely *without* any foundation in law.

In the **first** place, the petitioner's "submission" to the court-martial and the subsequent action by General Chamberlin and the Board of Review was "involuntary" and such "review" under AW 47 and 50 are entirely automatic and the petitioner could not prevent them.

In the **second** place, in Op. JAG, 1880, at p. 211, it is said (emphasis ours):

> "*A civilian* brought to trial before a court-martial, *cannot*, by a plea of guilty or other form of legal assent, *confer jurisdiction upon the court*, where no jurisdiction exists in law. XXXIX, 500."

In *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (C. A. 8, 1929), the petitioner, who had been convicted of desertion by an army general court-martial, sought his release by way of habeas corpus on the ground that, since he had never law-

fully been inducted into the Army, he was a *civilian* and the court-martial had no jurisdiction over his *person.* The record of trial (p. 879) established that, during the court-martial, the accused's counsel, when asked by the President if he wished to put in a plea to its jurisdiction over the person of the accused, expressly stated that he did *not* and that he *waived* any such possible plea.

In *reversing* a trial court order *dismissing* the writ, the Court of Appeals, at pages 879, 880, 881-882, said:

> "*We do not think that the jurisdiction of the court-martial could be waived by petitioner if he had not been lawfully drafted into the military service. The Second Article of War (10 USCA § 1473) defines persons subject to military law. The subject-matter is limited. It does not include persons not in military service.* There are exceptions, not here pertinent.
>
> • • • • •
>
> "In 22 Ops. Attys. Gen. 137, it was held that consent of the accused could not confer jurisdiction on a court-martial not possessing it by virtue of statutory authority.
>
> "The question remains whether the court-martial, whose judgment is attacked in the present proceeding, had jurisdiction to try petitioner as a deserter.
>
> "*A 'court-martial' is a tribunal of special and limited jurisdiction. Its judgments are open to collateral attack so far as questions relating to jurisdiction are concerned. McClaughry* v. *Deming,* 186 U. S. 49, 22 S. Ct. 786, 46 L. Ed. 1049; *Givens* v. *Zerbst,* 255 U. S. 11, 41 S. Ct. 227, 65 L. Ed. 475; *Collins* v. *McDonald,* 258 U. S. 416, 42 S. Ct. 326, 66 L. Ed. 692.
>
> "In the *McClaughry Case,* 186 U. S. 63, 22 S. Ct. 786, 791, 46 L. Ed. 1049, the Court quoted with approval the following from *Runkle* v. *United States,* 122 U. S. 543, 555, 7 S. Ct. 1141, 30 L. Ed. 1167:
>
> > '*A court-martial* organized under the laws of the United States *is a court of special and limited jurisdiction.* It is called into existence for a special purpose and to perform a particular duty.

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When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. § 470; *Brooks* v. *Adams*, 11 Pick. (Mass.) 441, 442; *Mills* v. *Martin*, 19 Johns (N. Y.) 7, 30; *Duffield* v. *Smith*, 3 Serg. & R. (Pa.) 590, 499. Such, also, is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch. 331, 2 L. Ed. 457, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. Ed. 650, 655, ranked a court-martial as "*one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.*" To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80, 15 L. Ed. 844; *Mills* v. *Martin*, 19 Johns. (N. Y.) 33. There are no presumptions in its favor, so far as these matters are concerned.'

"*The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts.* In *Givens* v. *Zerbst*, *supra*, 255 U. S. page 19, 41 S. Ct. 227, 229, 65 L. Ed. 475, the court said: '* * * In consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record.' These jurisdictional facts may appear on the face of the court-martial record, or they may be shown by extrinsic evidence when the collateral attack is made.

"*In the case at bar, among the jurisdictional facts necessary to appear was that the court-martial had jurisdiction of the subject-matter. In other words, that the accused had the status prescribed by the Second Article of War* (U. S. Comp. Stat. § 2308, now 10 USCA § 1473). * * *

> *"We therefore hold that petitioner was never lawfully inducted into the military service; that the court-martial had no jurisdiction to try him as a deserter; that its judgment was void; that the District Court erred in not granting the writ of habeas corpus and discharging the petitioner.* The order of the District Court is accordingly reversed, with directions to grant the writ of habeas corpus and discharge the petitioner." (Emphasis added.)

The *balance* of the respondents' argument under this issue (pp. 11-23) relates only to whether or not the "administrative review procedures" available to Army personnel (which does *not* include Giese as an honorably discharged veteran) have in fact "been exhausted".

While we personally suspect that the so-called "application for a new trial" to the Judge Advocate General under AW 53 is actually, in the language of this Court in *Levers* v. *Anderson*, 326 U. S. 219,

> "in its effect so much like the normal, formal type of a motion for a new trial that we cannot read into the Act an intention to make it a prerequisite to * * * judicial review",

we bow to the contrary ruling of this Court in *Gusick* v. *Schilder*, 340 U. S. 128, insofar as persons *still on active duty* in the Army at the time of their trial and conviction by court-martial *are concerned*, and *where* (as *there* but *not here*) a question of *fact*, *not* merely of *law*, is involved.

We do, however, *doubt* the soundness of the respondents' repeated statements (pp. 6, 12, 20, 21) to the effect that

> "under A. W. 51(a) (10 U. S. C. Supp. IV, 1523(a), the Commanding General has 'the power to mitigate, remit or suspend the whole or any part' of the sentence. Thus General Chamberlin may suspend or remit entirely the sentence of imprisonment."

In this connection, it should be noted

(1) That, some five months after the court-martial

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had sentenced the petitioner to dishonorable discharge, total forfeitures and three years confinement at hard labor (R. 7), General Chamberlin "approved" the sentence but reduced the period of confinement to ten months and mitigated the "dishonorable" discharge to a "bad conduct" discharge (R. 7);

(2) That, having "published" such sentence as so "reduced" and "mitigated," under Army law, he lost the power thereafter to "commute" or further "mitigate" such an "approved" sentence;"[17]

(3) That said A. W. 51 gives the powers "to mitigate, remit or suspend the whole or any part thereof" only to "the President, the Secretary of the Department of the Army and any reviewing authority;"

(4) That, on October 30, 1950, the Army's Board of Review held the record of the petitioner's trial "legally sufficient to support the finding of guilty and the sentence"; and

(5) That the Judge Advocate General, on October 31, 1950, merely gave General Chamberlin "authority to *execute* the sentence" (Respondents' Brief, p. 47).

We also submit that where, as here, a court-martial tries and convicts a *civilian*, over whose *person* it had *no jurisdiction*, and sentences him to confinement at hard labor, total forfeitures and (as mitigated) a "bad conduct

17. In Op., JAG, 1880, pp. 438-439, it is said (emphasis ours): "8. Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified *before* it is published and the party to be affected is duly notified of the same. *After* such notice the action is *beyond* recall. The power of *remission* indeed may be exercised so long as any part of the punishment imposed remains unexecuted. (See ONE HUNDRED AND TWELFTH ARTICLE § 4.) *But when the final approval of the sentence* (or other action taken), *has been once officially communicated to the accused, the function and authority of the reviewing authority as such over and respecting the same is exhausted and cannot be revived.* An approval cannot then be substituted for a disapproval, or *vice versa, nor can an approved punishment be mitigated or commuted.* VIII, 556; XXVII, 377; XXXI, 15."

discharge"; where, as here, the "convening authority" (General Chamberlin) takes some five months even to review the sentence (while the petitioner remained in confinement, away from his wife, daughter and grandchild); where, as here, the Board of Review takes some one and one-half years to "hold" that the record "is legally sufficient to support the finding and the sentence"; and where, as here, the Government has the audacity to contend that, since General Chamberlin has not as yet ordered the sentence "executed," release by way of habeas corpus cannot be had,—

it would seem that the case at bar is also an excellent example of a situation where, as the respondents themselves say (pp. 13, 14):

> "*the federal courts are shocked by a deprivation of liberty without legal sanction so that the immediate freedom of the petitioner appears more important than permitting the erring courts to correct their own mistakes,*"

and where

> "the action of the military authorities would appear so arbitrary and without sanction of law that the civil courts would conclude that to continue the imprisonment pending military review would be so unreasonable as to justify the immediate release of the prisoner. * * *."

In view of the foregoing considerations, we submit that by virtue of his *civilian* status following his 1946 discharge

"from the military service of the United States," the petitioner was *not* required to exhaust such "administrative review procedures" as may be available to *military* personnel under the Articles of War before resorting to habeas corpus.

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Conclusion.

We therefore pray that the said judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or be reversed and remanded with appropriate directions.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 564

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, PETITIONER

v.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Seventh Circuit (R. 58) reversing an order of the District Court for the Northern District of Illinois (R. 41) discharging petitioner from respondents' custody. The case arose in the following manner:

Petitioner enlisted in the United States Army

in 1926 and was discharged in 1929. On or about March 12, 1930, he reenlisted for a term of three years but went absent without leave on or about July 2, 1930, and remained absent in desertion until August 1942, at which time he was apprehended. On or about October 13, 1942, he was restored to duty for the duration of the war plus six months, pursuant to the Extension of Service Period Act of December 13, 1941 (Appendix A, *infra*, pp. 18-19).[1] On or about March 15, 1943, he again went absent in desertion. (R. 7.) On or about March 16, 1944, he was inducted into the Army; he did not reveal his former enlistment and desertion (R. 7, 8). He was honorably discharged on June 29, 1946. The certificate of discharge stated that petitioner was "honorably discharged from the military service" and gave the "Date of Induction" as March 16, 1944, but the space for "Date of Enlistment" was left blank (R. 39).

In 1948, the Criminal Investigation Division of the Army, through its fingerprint department, discovered that petitioner, as the inductee in 1944, was the same person who had deserted in 1943 (R. 7,

[1] It was alleged in the petition for a writ of habeas corpus (R. 3) that "in 1935 or 1936" petitioner "tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter" and that the Sheriff "received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that [petitioner] was not wanted, whereupon [petitioner] was released" by the Sheriff. These allegations were denied in the return to the writ (R. 6) and no evidence was heard and no findings of fact made thereon by the District Court.

15). In February 1949, upon further investigation, petitioner was arrested. Thereafter he was tried by a general court-martial convened at the headquarters of the Fifth Army, Chicago, Illinois, and convicted of the 1943 desertion, under the 58th Article of War, Act of June 4, 1920, c. 227, 41 Stat. 800, 10 U.S.C. 1530. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and three years at hard labor. On December 7, 1949, the Commanding General, respondent Lieutenant General S. J. Chamberlin, approved the sentence but reduced the period of confinement to ten months and mitigated the dishonorable discharge to a bad conduct discharge (R. 7). As required by AW 50(e) (as amended June 24, 1948, c. 625, 62 Stat. 604, 635, 10 U.S.C., Supp. III, 1521, Appendix A, *infra*, pp. 14-17), General Chamberlin withheld the order directing the execution of the sentence pending appellate review as prescribed by that article.[2]

Six days later, on December 13, 1949, before any action was taken by the Board of Review pursuant to AW 50(e), petitioner filed the petition for a writ of habeas corpus involved in this proceeding in which he claimed that he was a civilian not subject to the jurisdiction of the Army (R. 2-4). A writ was issued (R. 5) and a return was filed setting forth petitioner's military history as

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[2] The full text of General Chamberlin's order, taken from the official court-martial record, is copied in Appendix B, *infra*, p. 19.

detailed above (pp. 1-3) and pointing out, *inter alia*, that his conviction had not been reviewed and acted upon by the Board of Review or the Judge Advocate General in accordance with prescribed military procedure (R. 6-9). A hearing was held in the district court on December 16, 1949, at which the only evidence introduced was a certified copy of petitioner's honorable discharge certificate dated June 29, 1946 (R. 39). After argument of counsel, the court on the same day entered an order discharging petitioner from respondents' custody and enlarging him upon his own recognizance in the sum of $100 pending appeal (R. 41).

On respondents' appeal, the court of appeals on October 5, 1950, held that the district court had no jurisdiction to hear petitioner's habeas corpus petition until the remedies under Articles of War 47, 50(e), and 53 had been exhausted.[3] It declined, therefore, to pass upon the merits of petitioner's contention that he was not subject to military

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[3] AW 47(c) (Appendix A, *infra*, p. 14) requires review and approval of a conviction by a general court-martial by the convening authority, in this case, General Chamberlin. The court of appeals stated that petitioner filed his petition for a writ of habeas corpus before General Chamberlin acted on the conviction but that the action of General Chamberlin in approving and reducing the sentence was announced before the hearing in the district court. As we have seen, General Chamberlin's action was dated six days before the petition was filed. Article 50(e), however, required review by the Board of Review, and by other authorities in certain contingencies, and final approval before General Chamberlin could order the execution of the sentence. Article 53 (Appendix A, *infra*, pp. 17-18) provides a new remedy by way of a motion addressed to the Judge Advocate General for a new trial or other relief. See *Gusik* v. *Schilder*, 340 U.S. 128.

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jurisdiction. (R. 53-57; 184 F. 2d 404.) The cause was accordingly remanded to the district court "with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for a writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War" (R. 57).

DISCUSSION

We think the court of appeals was clearly correct in holding on this record that petitioner's attempt to attack collaterally the jurisdiction of the Army to try him for his 1943 desertion is premature. *Gusik* v. *Schilder,* 340 U.S. 128. At the time of the decision below, the review by the Board of Review required by AW 50(e) had not been completed and there had been no final appellate approval of petitioner's conviction and sentence, without which his ultimate sentence could not be executed. It follows *a fortiori* from the *Gusik* decision, requiring the exhaustion, in addition, of the new remedy by way of a motion for a new trial or other relief provided by AW 53 before recourse may be had to habeas corpus, that petitioner had no standing to attack his conviction.

Neither is petitioner in any better standing as of this date. On October 30, 1950, after the decision below, the Board of Review completed its ex-

amination of the record of petitioner's trial and held it to be legally sufficient to support the finding of guilty and the sentence. Since neither the Board nor the Judge Advocate General deemed confirming action necessary, the Judge Advocate General on October 31, 1950, in accordance with the provisions of AW 50(e)(1), transmitted the Board's holding to General Chamberlin and advised him that he was authorized to order the execution of the sentence.[4] We are advised by the Office of the Judge Advocate General that General Chamberlin has taken no further action on the sentence pending final disposition of the instant proceeding. In the absence of a final order by General Chamberlin the administrative process under AW 50(e) is incomplete, even for the purposes of a motion under AW 53. Cf. *Falbo* v. *United States*, 320 U.S. 549, 553-554. The promulgation of such an order is not a mere ministerial act, for under AW 51(a) (Appendix A, *infra*, p. 17) General Chamberlin has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. This power includes, of course, the power to remit entirely the sentence to imprisonment.

Petitioner attempts to circumvent the rule as to exhaustion of the processes prescribed by the Articles of War by asserting that the Army's juris-

[4] The full texts of these actions, taken from the official court-martial record, are set forth in Appendix B, *infra*, pp. 19-21.

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diction over him was terminated by virtue of his honorable discharge in 1946. But that discharge related only to his term of service pursuant to his induction in 1944, both by reason of the dates specifically appearing in the discharge, and as a matter of law.

The legal irrelevance of the 1946 discharge to the earlier 1930 enlistment results from the prohibition, in AW 108, of any but a special type of discharge when the discharge takes place before the expiration of an enlistment.[5] The enlistment from which petitioner deserted would not otherwise have expired until January 25, 1948, because the Extension of Service Period Act extended its term to six months after the termination of the war (see Appendix A, *infra*, pp. 18-19). Moreover, AW 107 prevented the expiration of an enlistment before the making up of time lost in desertion,[6] and this time could not be deemed made up

[5] AW 108, in effect in substantially the same form from 1806 through 1946 (10 U.S.C. 1580), provided that "no enlisted man shall be discharged from [the military] service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."

[6] Article 107 [10 U.S.C. 1579]. Soldiers to make good time lost.

"Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be

by the 1944-1946 military service, since an enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28[7] as a desertion and the soldier is deemed to have enlisted "fraudulently." The combined effect of Articles 28, 107, and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in Article 108.

The consistent administrative interpretation likewise supports this conclusion. Thus, the 1928 Manual for Courts-Martial, United States Army, which was in effect until February 1, 1949, provided (p. 8):

> A discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and therefore does not terminate other subsisting enlistments or relieve the soldier from

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liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

[7] "Article 28 [10 U.S.C. 1499]. Certain acts to constitute desertion.

* * *

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein."

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liability to trial by court-martial for an offense committed during any of such enlistments.[8]

Petitioner relies principally upon *Ex parte Drainer*, 65 F. Supp. 410 (N.D. Calif.), affirmed *sub nom. Gould* v. *Drainer*, 158 F. 2d 981 (C.A. 9). That case involved a desertion from the Marine Corps. The Articles for the Government of the Navy, as distinguished from AW 107, did not make mandatory the serving of the time lost in desertion,[9] nor

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[8] The 1949 Manual for Courts-Martial, United States Army, contains the same language (p. 10), except that the words "or bad conduct" are added after the word "dishonorable." See also the following:

Dig. Op. JAG 1912, p. 462:

"XXII A. An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment."

Dig. Op. JAG 1912-40, p. 381:

"(6) * * * A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917, which became effective as to him on August 5, 1917. 251.29, Jan. 25, 1919."

In CM 336336, case of Taylor (not reported), the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a subsequent enlistment.

[9] The Act of May 21, 1928, c. 650, 45 Stat. 620, 34 U.S.C. 183a, provides in pertinent part:

"* * * every enlisted man in the naval service who, without proper authority, absents himself from his ship, station, or

did they prohibit a discharge prior to the end of the term of an enlistment, as is the case under AW 108. Accordingly, the *Drainer* decision is distinguishable. Moreover, the reasoning of the decision is unpersuasive and ascribes undue weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34, 36, which held that a soldier's bounty was not forfeited where he returned from absence without leave and was restored to duty upon condition that he make up the lost time. Kelly's subsequent honorable discharge was considered an adequate substitute for removal of the charge of desertion from the rolls, but the characterization of the discharge as a final judgment of the Government does not support the view that such a discharge affects a desertion under an earlier, separate, and uncompleted enlistment.

The same considerations clearly distinguish *Hirshberg* v. *Cooke*, 336 U.S. 210, upon which petitioner also relies. For that case involved only the effect of an honorable discharge upon the jurisdiction of the Navy to try a sailor, who had re-enlisted, for an offense committed during the enlistment terminated by the discharge. The other cases

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duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, *may be permitted to serve*, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such unauthorized absence or confinement, amount to the full term of his enlistment." (Italics supplied.)

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cited by petitioner involved substantially similar facts.

But even if it should be thought that there is an unsettled question as to the Army's jurisdiction to try petitioner for his 1943 desertion, he is in no better position. For as this Court said in *Gusik* v. *Schilder*, 340 U.S. at 131-132:

> The policy underlying that rule [precluding a challenge by habeas corpus in a federal court of the jurisdiction of a state court until state procedures are exhausted] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

In view of this Court's disposition of the intervening *Gusik* case, a question remains as to the appropriate order to be entered in this case. In *Gusik* this Court remanded the cause to the court

of appeals to hold pending Gusik's recourse to the remedy under AW 53. But in that case "Trial of the case in the District Court had ended before the effective date of Article 53 and the question of the exhaustion of the new remedy which the Article affords was not raised until the case was in the Court of Appeals." In those circumstances this Court thought that Gusik should "not be put to the time and expense of trying anew the case which he tried when he had no relief other than habeas corpus" in the event the motion under AW 53 should be denied. 340 U.S. at 133-134. Here, on the other hand, as we have pointed out, the steps prescribed by Articles 50(e) and 51(a) had not been completed at the time the petition for a writ of habeas corpus was filed and there still has been no final action by General Chamberlin under Article 51(a). Beyond that, the remedy under Article 53 will be available to petitioner if he sees fit to invoke it in the light of such final action as General Chamberlin may take. Moreover, the very basis for a habeas corpus proceeding may be eliminated in view of General Chamberlin's power to mitigate, remit or suspend the whole or any part of petitioner's sentence. In addition, as distinguished from the situation in Gusik's case, the trial of the instant proceeding in the district court consisted largely of arguments of counsel on the legal issues presented by the pleadings. Hence, petitioner will suffer no great inconvenience if he should be re-

quired to proceed anew after the remaining procedures are exhausted.

If, however, this Court should feel that these factors do not differentiate this case from Gusik's in respect of its proper disposition, we suggest that it would be appropriate to grant the writ of certiorari, vacate the judgment of the court of appeals, and remand the cause to that court with directions to hold it pending reasonable opportunity for completion of the administrative processes.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

MARCH 1951.

APPENDIX A

The pertinent provisions of the Articles of War, as amended by the Act of June 24, 1948, c. 625, title II, 62 Stat. 634, 635, 638, 639, are as follows:

Art. 47 [10 U.S.C. Supp. III, 1518] Action by convening authority—* * *

* * * * *

(c) Action on record of trial.

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

(d) Approval.

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

* * * * *

Art. 50 [10 U.S.C., Supp. III, 1521] Appellate review—* * *

* * * * *

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(e) Action by Board of Review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.

No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence,

but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

* * * * *

(g) Weighing evidence.

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of wit-

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nesses, and determine controverted questions of fact.

* * * * *

Art. 51 [10 U.S.C., Supp. III, 1523] Mitigation, remission, and suspension of sentences —(a) At the time ordered executed.

The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. * * *

* * * * *

Art. 53 [10 U.S.C., Supp. III, 1525] Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within

one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Section 2 [10] of the Act of December 13, 1941, c. 571, 55 Stat. 799, 800, 50 U.S.C. App. 732, provided:

The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section [during the existence of any war in which

[10] The Joint Resolution of July 25, 1947, c. 327, Sec. 3, 61 Stat. 451 (see 50 U.S.C., Supp. III, App. 732), provided that in the interpretation of this section relating to the extension of periods of service, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress.

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the United States is engaged, and during the six months immediately following the termination of any such war]: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

APPENDIX B

The following documents are of record in the official file, No. 339567, of The Judge Advocate General's Office:

HEADQUARTERS FIFTH ARMY

Chicago 15, Illinois

7 December, 1949.

In the foregoing case of Recruit William H. Giese, RA 6 758 678, 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, the sentence is approved, but the period of confinement is reduced to ten months and the dishonorable discharge is mitigated to a bad conduct discharge.

The Post Guardhouse, Fort Sheridan, Illinois, is designated as the place of confinement.

Pursuant to Article of War 50e, the order directing the execution of the sentence is withheld.

[Signed] S. J. CHAMBERLIN,
S. J. CHAMBERLIN,
Lieutenant General, U. S. Army,
Commanding.

DEPARTMENT OF THE ARMY

Office of The Judge Advocate General,
Washington 25, D. C.

Board of Review

CM 339657 30 October 1950.

UNITED STATES

v.

RECRUIT WILLIAM H. GIESE (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois.

Fifth Army

Trial by G.C.M., convened at Chicago, Illinois, 16 and 30 June and 7 July 1949. Bad conduct discharge, total forfeitures after promulgation and confinement for ten (10) months. Post Guardhouse.

HOLDING BY THE BOARD OF REVIEW

GUIMOND, BISANT AND OEDING
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

[Signed] J. A. GUIMOND, J.A.G.C.
[Signed] OSCAR M. BISANT, J.A.G.C.
[Signed] ERNST C. OEDING, J.A.G.C.

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1st Indorsement

October 31, 1950.

Dept. of Army J.A.G.C.

To the Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit William H. Giese (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

[CM 339657].

For the Judge Advocate General;
[Signed] W. P. CONNALLY, JR.
WILLIAM P. CONNALLY, JR.,
Colonel, JAGC,
Assistant Judge Advocate General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 936699 697

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, PETITIONER

v.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 53-57) is reported at 184 F. 2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered October 5, 1950 (R. 58). On December 28, 1950, the time to file a petition for a writ of certiorari was extended by Mr. Justice Minton to March 3, 1951 (R. 62). The petition was filed

on February 19, 1951, and was granted on April 9, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the exhaustion of military remedies was a prerequisite to habeas corpus where the petitioner attacked the jurisdiction of a court-martial on the basis of his alleged civilian status.

2. Whether an honorable discharge for the period for which petitioner had been drafted releases him from liability for desertion from a former enlistment which had not expired, which he did not reveal at the time he was drafted, and which was not known at the time of the discharge.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 38-44.

STATEMENT

Petitioner enlisted in the United States Army in 1926 and was discharged in 1929. On or about March 12, 1930, he reenlisted for a term of three years but went absent without leave on or about July 2, 1930, and remained absent in desertion until August 1942, at which time he was apprehended. On or about October 13, 1942, he was restored to duty. Pursuant to the Extension of Service Period Act of December 13, 1941 (Appendix A, *infra*, p. 44), his term would have extended for the duration of the war plus six months. On or about

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March 15, 1943, he again went absent in desertion. (R. 7.)

He was inducted into the Army on March 16, 1944, but did not reveal his former enlistment and desertion (R. 7, 8). He was honorably discharged on June 29, 1946. The certificate of discharge stated that petitioner was "honorably discharged from the military service" and gave the "Date of Induction" as March 16, 1944, but the space for "Date of Enlistment" was left blank (R. 39).

In 1948, the Criminal Investigation Division of the Army, through its fingerprint department, discovered that petitioner was the person who had deserted in 1943 (R. 7, 15). In February 1949, after further investigation, petitioner was arrested. Thereafter he was tried by a general court-martial convened at the headquarters of the Fifth Army, Chicago, Illinois, and convicted of the 1943 desertion, under the 58th Article of War, Act of June 4, 1920, c. 227, 41 Stat. 800, 10 U.S.C. 1530. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and three years at hard labor. On December 7, 1949, the Commanding General, respondent Lieutenant General S. J. Chamberlin, approved the sentence but reduced the period of confinement to ten months and mitigated the dishonorable discharge to a bad conduct discharge. (R. 7.) As required by AW 50(e) (as amended June 24, 1948, c. 625, 62 Stat. 604, 635, 10 U.S.C., Supp. IV, 1521, Appendix A,

infra, pp. 40-42), General Chamberlin withheld the order directing the execution of the sentence pending appellate review as prescribed by that article.[1]

Six days later, on December 13, 1949, before any action had been taken by the Board of Review pursuant to AW 50(e), petitioner filed the petition for a writ of habeas corpus involved in this proceeding in which he claimed that he was a civilian not subject to the jurisdiction of the Army (R. 2-4). A writ was issued (R. 5) and a return was filed setting forth petitioner's military history as detailed above (pp. 2-4) and pointing out, *inter alia,* that his conviction had not been reviewed and acted upon by the Board of Review or the Judge Advocate General in accordance with prescribed military procedure (R. 6-9). A hearing was held in the district court on December 16, 1949, at which the only evidence introduced was a certified copy of petitioner's honorable discharge certificate dated June 29, 1946 (R. 39). After argument of counsel, the court on the same day entered an order discharging petitioner from respondents' custody and enlarging him upon his own recognizance in the sum of $100 pending appeal. (R. 41.)

On respondents' appeal, the court of appeals on October 5, 1950, held that the district court had

[1] The full text of General Chamberlin's order, taken from the official court-martial record, is copied in Appendix B, *infra,* pp. 45-47.

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no jurisdiction to hear petitioner's habeas corpus petition until the remedies under Articles of War 47, 50(e), and 53 had been exhausted.[2] It declined, therefore, to pass upon the merits of petitioner's contention that he was not subject to military jurisdiction. (R. 53-57; 184 F. 2d 404). The cause was accordingly remanded to the district court "with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for a writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War" (R. 57).

On October 30, 1950, after the decision below, the Board of Review completed its examination of the record of petitioner's trial and held it to be legally sufficient to support the finding of guilty and the sentence. Since neither the Board nor

[2] AW 47(c) (Appendix A, *infra*, pp. 39-40) requires review and approval of a conviction by a general court-martial by the convening authority, in this case, General Chamberlin. The court of appeals stated that petitioner filed his petition for a writ of habeas corpus before General Chamberlin acted on the conviction but that the action of General Chamberlin in approving and reducing the sentence was announced before the hearing in the district court. As we have seen, General Chamberlin's action was dated six days before the petition was filed. Article 50(e), however, required review by the Board of Review, and by other authorities in certain contingencies, and final approval before General Chamberlin could order the execution of the sentence. Article 53 (Appendix A, *infra*, pp. 43-44) provides a new remedy by way of a motion addressed to the Judge Advocate General for a new trial or other relief. See *Gusik* v. *Schilder*, 340 U.S. 128.

the Judge Advocate General deemed confirming action necessary, the Judge Advocate General on October 31, 1950, in accordance with the provisions of AW 50(e)(1), transmitted the Board's holding to General Chamberlin and advised him that he was authorized to order the execution of the sentence.[3] We are advised by the Office of the Judge Advocate General that General Chamberlin has taken no further action on the sentence pending final disposition of the instant proceeding. Under AW 51(a) (Appendix A, *infra*, p. 42) General Chamberlin has "the power to mitigate, remit, or suspend the whole or any part" of the sentence.

SUMMARY OF ARGUMENT

I

The petition for a writ of habeas corpus was filed before petitioner's conviction by court-martial had been reviewed by the Board of Review as required by AW 50(e). As of this date the military process of review is still not complete, for the commanding officer, who has power to mitigate the whole or any part of a sentence (AW 51(a)), has not yet acted to promulgate the sentence of the court-martial, and no motion for a new trial under AW 53 has been made.

The court below directed dismissal of the petition on the principle that resort to habeas corpus

---

[3] The full texts of these actions, taken from the official court-martial record, are set forth in Appendix B, *infra*, pp. 45-47.

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is premature unless all the available processes prescribed in the Articles of War, including the remedy of a motion for new trial, have been exhausted. This Court shortly thereafter affirmed this principle in *Gusik* v. *Schilder,* 340 U.S. 128. The present case is one in which the military proceedings are further from completion than in the *Gusik* case; here the time to move for a new trial has not even been reached since the sentence of the court martial has not yet been ordered executed by the Commanding General.

We do not urge that the *Gusik* case holds that never, under any circumstances, will a federal court review a court-martial through habeas corpus except after the conclusion of the military procedures. This Court has held that the importance of the writ to constitutional freedoms precludes its being circumscribed by any rigid conditions. The question in each case must be whether the deprivation of liberty is so shocking, or the requirement that the petitioner go through the appellate procedures so unreasonable, that the federal courts are justified in exercising their discretion to intercede at an earlier stage. Such is not the situation in this case.

The military authorities did not act without apparent sanction of law. The legal question involved, and there is no factual question of substance, is whether the honorable discharge from the period of service from 1944 to 1946 serves to release the petitioner from liability for desertion committed in an earlier and undisclosed enlistment from which

he had never been formally discharged. This is clearly not a situation in which the Army picked up a civilian who owed no duty of submission to military discipline and proceeded to try and convict him.

Petitioner argues that his claim to be a civilian goes to the jurisdiction of the court-martial and therefore precludes the application of the rule of the *Gusik* case and permits resort to habeas corpus prior to completion of the military procedures. The decisions of this Court establish that habeas corpus is not available in the early stages of a proceeding merely because the petitioner attacks the jurisdiction of the court to try him or the basic authority under which he is held in custody. *Henry* v. *Henkel*, 235 U.S. 219; *United States* v. *Sing Tuck*, 194 U.S. 161.

The issue of the jurisdiction of the court-martial was squarely raised at the trial, was considered in the initial steps of the military review, and can be reconsidered on application for a new trial. There is therefore no need at the present time for intervention by the civil courts. In fact, if the petitioner's argument on the merits were sound, it should be presumed that the military authorities will apply the law correctly and will release the petitioner. The new trial procedure of AW 53 provides a real and effective remedy. It was intended by Congress and has in fact been administered to correct the mistakes and the injustices which have occurred in the regular proceedings. To grant habeas corpus

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at this juncture would be to substitute the writ for the regular appellate procedure.

II

Assuming that petitioner may at this time contest the jurisdiction of the court-martial by habeas corpus, the judgment of the court below should be sustained on the ground that petitioner is validly detained in the custody of the Army. Petitioner's honorable discharge covered no more than on its face it purported to cover, *i.e.*, petitioner's service from March 16, 1944 to June 29, 1946. It did not condone petitioner's desertion from his prior enlistment in 1943.

AW 107 (Appendix A, *infra*, pp. 38-39) provides that a deserter, before being discharged from his enlistment, is liable to serve, after his return to a full duty status, the balance of his enlistment remaining unserved at the time of his desertion. At the time petitioner deserted he would have had more than two years to serve under AW 107 irrespective of the Extension of Service Act. Under that Act his enlistment would not have expired until January 1948. The time lost could not be deemed made up by the 1944 to 1946 military service since enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28 (Appendix A, *infra*, p. 38) as a desertion. AW 108 (Appendix A, *infra*, p. 39) prohibits a discharge before expiration of the term of service except by

order of certain officers or by sentence of a general court-martial. The combined effect of Articles 28, 107 and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted in the absence of a special order.

The long-continued, consistent administrative interpretation supports the view that a discharge relates only to the period it purports to cover, and does not release a deserter from liability for desertion in a prior enlistment. Manual for Courts Martial 1928, p. 8; Winthrop, Dig. Op. JAG 1895, p. 360; Dig. Op. JAG 1912, p. 462; Dig. Op. JAG 1912-1940, p. 381. This long-established interpretation is entitled to great weight. *Hiatt* v. *Brown*, 339 U.S. 103, 109; *Hirshberg* v. *Cooke*, 336 U.S. 210, 216. Congress has adopted this interpretation of the effect of a discharge in Article 3(c) of the new Uniform Code of Military Justice (64 Stat. 109, 50 U.S.C., Supp. IV, 553 (c)).

The construction of an honorable discharge as relating only to the period of enlistment which it purports to cover accords with the practical realities confronting the Army after the termination of hostilities in World War II. The only effective method of discovering deserters is by means of fingerprints. With millions of persons involved, names mean little in the military services. Serial numbers are the prime means of identification. Where, as here, a deserter disclaims prior service at induction and receives a new serial number, prior desertion cannot readily be discovered. It

would seriously have delayed demobilization to have checked the fingerprints of all soldiers prior to their separation. To hold that petitioner's honorable discharge under one serial number released him from liability from a desertion in a prior enlistment which had not expired and which he did not reveal at the time of induction would thwart the clear intention of Congress that soldiers should not be permitted to evade their enlistment obligations. Petitioner's 1946 discharge for the period from 1944 to 1946 did not deprive the court-martial of jurisdiction to try him for his 1943 desertion.

ARGUMENT

I

The Resort to Habeas Corpus Is Premature, Since the Military Procedures Have Not Been Completed

In *Gusik* v. *Schilder,* 340 U.S. 128, this Court held that resort to habeas corpus by a person detained under sentence of a court-martial is premature if the petition is filed before all the available procedures prescribed in the Articles of War, including the remedy of a motion for a new trial under AW 53, have been exhausted. Admittedly, petitioner has not applied for a new trial under AW 53 in this case, although the time for doing so has not expired. Moreover, as of the time of his petition for habeas corpus, the review by the Board of Review under AW 50(e) (10 U.S.C., Supp. IV, 1521(e)) had not been completed. As of the present time, the Board of Review has examined the record

and found it sufficient (see p. 5, *supra*), but the Commanding General has not yet promulgated an order directing the execution of the sentence. The issuance of this order is not merely a ministerial act, for, under AW 51(a) (10 U.S.C., Supp. IV, 1523(a)), the Commanding General has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. Thus General Chamberlin may suspend or remit entirely the sentence of imprisonment, thereby eliminating all basis for habeas corpus. Inasmuch as the military remedies had not been completed, the court below ordered that the petition be dismissed without prejudice to renewal upon completion of military processes (R. 57).

The *Gusik* decision does not, of course, expound a new doctrine (see, *e.g.*, *Mooney* v. *Holohan*, 294 U.S. 103; *Ex parte Hawk*, 321 U.S. 114); its particular significance in this case is that it applies a well-established policy to military procedures and to the specific remedy provided by AW 53.

It is recognized that the exhaustion of the review procedures provided by the authority which is depriving the prisoner of his liberty is not a jurisdictional prerequisite of habeas corpus, and that in appropriate cases the federal courts retain the discretion to grant the writ even where an appeal has not been taken. *Bowen* v. *Johnston*, 306 U.S. 19. The federal courts have adopted this self-imposed limitation on the grant of the writ in order to promote the orderly administration of justice by dis-

couraging the use of habeas corpus as a substitute for ordinary administrative and review procedures. Exceptions to the general rule occur where the federal courts are shocked by a deprivation of liberty without legal sanction so that the immediate freedom of the petitioner appears more important than permitting the erring courts to correct their own mistakes. The importance of the writ, not only historically but in its current application, is so great that this Court has refused to permit it to be confined by rigid requirements which would prevent a court from protecting a petitioner's liberty where the judicial conscience would be repulsed by his continued confinement. See *Sunal* v. *Large*, 332 U.S. 174, 178-180.

This case is not one in which an exception should be made to the general rule. Assuming, for the sake of the argument, that the petitioner can eventually establish on the merits that he is entitled to his freedom, nevertheless this case is still not an appropriate one for the grant of habeas corpus prior to the completion of the regular military procedures.

The petitioner relies principally on the argument that he was a civilian at the time of his arrest, trial, and conviction, and was therefore not subject to the authority of the particular court-martial or of any other court-martial. He bases his argument upon the honorable discharge which was given him in 1946, which, it is contended, relieved him entirely

from subjection to military law.[4] In meeting this argument, it is not necessary to take the position that habeas corpus should not be allowed in a situation where the military authorities attempt to reach out into the civilian population and assume authority over an individual who is not and never has been subject to military justice.[5] One can certainly imagine a hypothetical case where the action of the military authorities would appear so arbitrary and without sanction of law that the civil courts would conclude that to continue the imprisonment pending military review would be so unreasonable as to justify the immediate release of the prisoner. This was the type of situation contemplated by the court in *Henry* v. *Henkel*, 235 U.S. 219, in which the Court said, at page 230:

> The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such case the committing court would have no jurisdic-

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[4] It was also alleged in the petition for a writ of habeas corpus (R. 3) that "in 1935 or 1936" petitioner "tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter" and that the Sheriff "received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that [petitioner] was not wanted, whereupon [petitioner] was released" by the Sheriff. These allegations were denied in the return to the writ (R. 6) and no evidence was heard and no findings of fact made thereon by the District Court. Therefore, these facts cannot be regarded as established for the purposes of the present review.

[5] Cf. *Billings* v. *Truesdell*, 321 U.S. 542.

> tion, the prisoner would be in custody without warrant of law and therefore entitled to his discharge. *Greene* v. *Henkel*, 183 U.S. 249, 261. But the presumption is in favor of the validity of every act of Congress and it would not be proper for the committing magistrate to treat as invalid a statutory declaration of what should constitute an offense, except in those rare and extreme cases in which the act was plainly and palpably void.

Compare *Ohio* v. *Thomas*, 173 U.S. 276 (holding that the court would take jurisdiction of a habeas corpus proceeding to release a federal officer held for trial by a state); *In re Neagle*, 135 U.S. 1.

Here, on the other hand, stated in terms most favorable to the petitioner, a very real basis for asserting military jurisdiction exists, since the honorable discharge on which he relies relates specifically to his term of service from 1944 to 1946, and makes no specific reference to releasing him from service for any earlier period or terminating his liabilities for any prior derelictions. We shall argue in Point II of this brief that the action of the court-martial was entirely legal and proper; for the present, it suffices to point out that, whatever the ultimate disposition of the case on the merits, the assertion of jurisdiction by the court-martial does not appear to have been arbitrary or without color of law.

Since the action of the court-martial was not on its face arbitrary, petitioner's argument comes down to the proposition that because the issue he

raises is one which challenges the ultimate jurisdiction of the military authorities to hold and try him, he is now entitled to have that issue determined by the civil courts rather than await the final determination of the military courts.

If this argument is based on lack of jurisdiction as such, it is fallacious, since the ultimate ground for all habeas corpus proceedings is lack of jurisdiction in the persons depriving the petitioner of his liberty. See *Whelchel* v. *McDonald*, 340 U. S. 122, 126. Therefore, in every case where there is a sound basis for seeking habeas corpus there would be no room for requiring the exhaustion of appellate procedures. Petitioner's argument would eliminate in its entirety the principle of requiring that review procedures be completed.

To make sense of the petitioner's argument, it must be limited to jurisdiction *in personam;* that is, to situations where the petitioner is asserted not to be one of the class over which the imprisoning court has power. There seems to be no logical basis for arguing that lack of jurisdiction *in personam* should be considered a more fundamental error than lack of jurisdiction for any other reason. An unconstitutional statute used as a basis for depriving a man of his liberty would seem as serious a defect as lack of jurisdiction over the person. But it has been held that the issue of constitutionality does not justify the grant of habeas corpus prior to exhaustion of appellate procedures. *Henry* v.

Henkel, 235 U. S. 219; *Ex parte Royall*, 117 U. S. 241. Cf. *In re Lancaster*, 137 U. S. 393. Similarly, to deprive a man of his liberty under a misconstruction of a statute, so that in the end it will be found that he did not commit any crime at all, seems to be as serious an infringement of his constitutional rights. *Sunal* v. *Large*, 332 U. S. 174.

Assuming, however, that the issue is different when jurisdiction over the person of the petitioner is involved, that specific situation was met in *United States* v. *Sing Tuck*, 194 U. S. 161. In that case a group of Chinese were held by the immigration authorities when they attempted to enter the country. The petitioners asserted that they were citizens of the United States by birth, that the immigration authorities had power to restrain only aliens, and that therefore their detention was totally illegal. Mr. Justice Holmes delivered the opinion for the majority of the Court, stating at p. 168:

> We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of

> an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet except under exceptional circumstances the courts of the United States do not interfere by *habeas corpus*. The prisoner must in the first place take his case to the highest court of the State to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. *Minnesota* v. *Brundage*, 180 U. S. 499; *Baker* v. *Grice*, 169 U. S. 284. * * *

We do not present these arguments as technical limitations on the district court's discretion to grant the writ. On the contrary, we recognize that it was the court's duty to issue the writ if awaiting the exhaustion of the military procedures would for any reason have deprived him of his liberty without providing adequate means for correcting the errors he alleges existed. If, for example, the review procedures would not have included an examination into the jurisdictional issue, there might be reason for resort to the civil courts. In this case, however, there can be no question but that the issue of the jurisdiction of the court-martial

may properly be considered on an application for a new trial under AW 53. See Manual for Courts-Martial, 1949, p. 108. Indeed, this would seem to be the kind of case where the civil courts might well prefer to await the prior action of the military authorities because of their presumed acquaintance with this type of question.[6]

Nor is this a situation where the petition for a new trial is largely a matter of form. Cf. *Levers* v. *Anderson*, 326 U.S. 219. The review procedures provided by AW 53 were very different from the regular appellate procedure under AW 50. In the regular appeals, the record was reviewed by a Board of Review, with a provision for additional consideration by The Judge Advocate General and by the Judicial Council under certain circumstances specified in AW 50 (*infra*, pp. 40-42).[7] In the procedure under AW 53,

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[6] Cf. *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, in which the same principles were applied to anticipation of administrative action.

[7] A case is transmitted to the Judicial Council for confirming action (1) when the Judge Advocate General or the Board of Review deems such action necessary, (2) when the Board of Review holds the record legally sufficient to support the findings of guilty and sentence but modification of the findings or sentence is deemed necessary to the end of justice by the Board of Review or the Judge Advocate General, and (3) when the Board of Review holds the record legally insufficient but the Judge Advocate General does not concur. AW 50(e). Under the provisions of Article of War 48 (c) and (d) (10 U.S.C., Supp. IV, 1519 (c), (d)), in addition to

the review is required to be made by The Judge Advocate General himself.[8] Moreover, the scope of review is different. The purpose of the original review applicable to this case was to determine whether the record of trial was legally sufficient to support the findings of guilty and the sentence (AW 50 (e)). Under AW 53, The Judge Advocate General is authorized to consider not only the record of trial but also any facts and information presented to him, whether included in the record or not.[9] Actually, in this case there is present not

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the approval required by Article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

(c) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

(1) when the confirming action of the Judicial Council is not unanimous, or when by direction of The Judge Advocate General his participation in the confirming action is required, or

(2) involving imprisonment for life, or

(3) involving the dismissal of an officer other than a general officer, or

(4) involving the dismissal or suspension of a cadet;

(d) By the Judicial Council with respect to any sentence in a case transmitted to the Judicial Council under the provisions of article 50 for confirming action.

In this case, under the provisions of AW 50 (e)(1), confirming action by the Judicial Council was not deemed necessary by The Judge Advocate General or the Board of Review. (See pp. 46-47, *infra*.)

[8] The Judge Advocate General's Office advises that the staff which assists The Judge Advocate General in applications under AW 53 is separate and distinct from officers working on review under AW 50 and that The Judge Advocate General has personally signed his actions and opinions in these cases (see Memorandum Opinions of The Judge Advocate General of the Army).

[9] See Manual for Courts-Martial (1949) pp. 108-110; Manual for Courts-Martial, United States (1951) p. 180.

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only the possibility of reversal on rehearing; there is, as pointed out above (*supra*, p. 6), the additional possibility that the Commanding General will commute the sentence of imprisonment when ordering the sentence executed.

Stripped of petitioner's eloquence, all that this case amounts to is that he has been tried for desertion, has defended himself on the ground that he was not subject to military discipline, and has been found subject to the jurisdiction of the military court and adjudged guilty of the offense charged. The issue presented in the habeas corpus proceeding was urged before the court-martial, was considered on review, and may be argued in the procedures provided by AW 53. It appears particularly inappropriate that, having submitted this issue to the military authorities, petitioner should now be entitled to resort to habeas corpus without exhausting the procedures which he has already sought to utilize. The reason the petitioner seeks such relief is not primarily because he believes that the federal civil courts are the appropriate forum, but because he has received a negative answer in his initial approaches to the military courts. In its most obvious form, this is an attempt to substitute habeas corpus for appellate review, and in that sense is to be distinguished from many of the cases cited by petitioner where the resort to habeas corpus was made at the very beginning of the proceeding. See, *e.g.*, *United States*

ex rel. Viscardi v. *MacDonald*, 265 Fed. 695 (E. D. N. Y.); *United States ex rel. Santantonio* v. *Warden*, 265 Fed. 787 (E. D. N. Y.); and *Ex Parte Wilson*, 33 F. 2d 214 (E. D. Va.).[10] In the corresponding situation with respect to extradition proceedings, this Court has noted, as one reason for denying the writ, that the petitioner waited until he had been surrendered to the state where he was tried before challenging the authority of the surrendering state. *Cook* v. *Hart*, 146 U. S. 183, 193.

Even the dissenting opinions of this Court which have taken the most generous position toward granting the writ in the absence of completion of appellate procedures, have fallen far short of the position urged by the petitioner in this case. Thus, in *Sunal* v. *Large*, 332 U.S. 174, Mr. Justice Rutledge, at 189, expressed his position as follows:

> The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available.

In the same case, Mr. Justice Frankfurter, dissenting at page 187, approved Judge Learned Hand's statement that the writ should be granted wherever it is necessary "to prevent a complete miscarriage of justice," citing 157 F. 2d 811, 813. No support is found in the opinions in this Court, either majority or dissenting, to uphold the use of

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[10] Petitioner's citation of *Hirshberg* v. *Cooke*, 336 U.S. 210, is inappropriate for there the court-martial proceedings had been completed.

habeas corpus when review processes are not only available but where it appears that such procedure is entirely appropriate to meet the alleged error in the trial court.

It is therefore urged that this particular case not only does not show exceptional circumstances justifying departure from the general rule requiring the exhaustion of the military procedures but that it is, on the contrary, an excellent example of a situation justifying the existence of the rule.

II

Petitioner's 1946 Honorable Discharge Related Only to the Period It Purported to Cover and Did Not Relieve Him from His Obligations under His Prior Enlistment Nor Preclude His Court-martial for Desertion Therefrom

Assuming that petitioner may at this time contest the jurisdiction of the court-martial by habeas corpus proceedings, the judgment of the court below, ordering dismissal of the petition and discharge of the writ, should be sustained on the ground that petitioner is validly detained in the custody of the Army.[11] It is respondents' position that petitioner's honorable discharge covered no more than on its face it purported to cover, i.e., pe-

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[11] Some modification of the judgment below would be necessary since, under the holding of the court below the dismissal would be without prejudice to the right to file a new petition for a writ of habeas corpus after the administrative remedies have been exhausted (R. 57). If the merits of the attacked jurisdiction are considered and sustained, there would be no reason for a dismissal without prejudice.

titioner's service from March 16, 1944, to June 29, 1946. The honorable discharge, therefore, did not condone petitioner's desertion in 1943 from his prior enlistment or preclude his trial by court-martial for such desertion.

A. *Petitioner's 1930 enlistment was still in effect at the time of his trial before the court-martial, unless the 1946 discharge acted as a release from it.*

Enlistment is a contract. It changes the status of the enlistee from civilian to military. No breach of the contract destroys the new status or relieves from the obligations imposed by the contract. *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157, 159-160. Upon his enlistment petitioner "became entirely subject to the control of the United States in respect of all things pertaining to or affecting his service." *United States* v. *Williams*, 302 U.S. 46, 50. AW 107 (10 U.S.C. 1579, pp. 38-39) provides that a deserter, before being discharged from his enlistment, is liable to serve, after his return to a full duty status, the balance of his enlistment term remaining unserved at the time of his desertion.[12] A similar provision has

[12] Art. 107 [10 U.S.C. 1579]:

> Every soldier who in an existing or subsequent enlistment deserts the service of the United States * * * shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

been in the Articles of War since 1802. (Act of March 16, 1802, Sec. 18, 2 Stat. 136.) This liability to make good the time lost by desertion is independent of punishment for the desertion. This Court said, in the *Morrissey* case, *supra,* (137 U.S. at 159-160) that petitioner's "desertion and concealment for five years did not relieve him from his obligations as a soldier, or his liability to military control."

At the time petitioner deserted in 1943, he would have had more than two years of his 1930 three-year enlistment to serve [13] under AW 107, regardless of the Extension of Service Period Act.[14] Because of his desertions, his obligation to serve had not been discharged at the time of his apprehension in 1949. The time lost from this enlistment was not made up by the 1944-1946 military service since an enlistment by a soldier already subject to an existing enlistment "without having first received a regular discharge" is defined in AW 28 (10 U.S.C. 1499, Appendix A, *infra,* p. 38) as a desertion and the soldier is deemed to have en-

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[13] He served from March 12, 1930 to July 2, 1930, before deserting the first time, and from October 13, 1942 to March 15, 1943, before deserting the second time. See pp. 2-3, *supra.* He thus had served only approximately nine months of the three-year enlistment period.

[14] Under that Act his enlistment would have extended to six months after the termination of the war, *i.e.*, to January 25, 1948. Section 3 of the Joint Resolution of July 25, 1947 (61 Stat. 451) provided that in the interpretation of the said Act, July 25, 1947, was to be deemed the date of termination of the war.

listed "fraudulently." Davis in his *Military Law of the United States*, 3rd ed., p. 432, explains the history and purpose of this provision as follows:

> Although this requirement had formed a part of the English Articles of War for a number of years, it was not formally embodied in the Mutiny Act until 1783. It will be found as Article 3, Section 6, of the British Code of 1774, as Article 3, Section 5, of the American Articles of 1776, and as No. 22 of the Articles of 1806.
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> * * * The object of the provision, as it originally appears in the British Code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.

Moreover, the language of AW 107 that "[e]very soldier who in an existing or subsequent enlistment deserts * * * shall be liable to serve, after his return to a full duty status, for such period as shall, with the time he may have served prior to such desertion * * * amount to the full term of that part of his enlistment period" would preclude crediting the 1944-1946 service to the prior enlistment. And see Army Regulations 615-360, *infra*, note 15, p. 28.

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B. *The 1946 honorable discharge did not release petitioner from his 1930 enlistment nor relieve him of liability for violations occurring during that enlistment.*

Despite the obligations of petitioner under his earlier enlistment (*In re Morrissey*, 137 U.S. 157; AW 107), with its attendant subjection to court-martial jurisdiction (AW 2, 10 U.S.C. 1473), petitioner claims that his 1946 honorable discharge, which by its dates referred only to the 1944-1946 service and contained a serial number pertaining to that service only, and which was issued without knowledge of the prior desertion, discharged him from the prior enlistment and made him a civilian, no longer subject to court-martial jurisdiction.

The only statute dealing with discharges from the military service is AW 108 (10 U.S.C. 1580, Appendix A, *infra*, p. 39). *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575 (W.D. Okla.); *Reid* v. *United States*, 161 Fed. 469, 471 (S.D. N.Y.), writ of error dismissed, 211 U.S. 529; cf. *Lamb* v. *Patterson*, 329 U.S. 539, 542. This article prohibits a discharge before expiration of "term of service" except by order of certain officers or by sentence of a general court-martial. It has been held that no discharge may be given a soldier except as authorized by AW 108. *Nordmann* v. *Woodring, supra; Reid* v. *United States, supra;* Winthrop, *Digest of Opinions of The Judge Advocate General, 1895*, page 21.

The combined effect of Articles 28, 107, and 108 accordingly prohibited the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in AW 108. Cf. *In re Markun*, 232 Fed. 1018 (E.D. Pa.) No such order authorized petitioner's discharge.[15]

The long-continued consistent administrative interpretation supports the conclusion that a discharge relates only to the period it purports to cover and does not release a deserter from liability for deserting in a prior unexpired enlistment. Thus, the 1928 Manual for Courts-Martial, United States Army, which was in effect until February 1, 1949, provided (p. 8):

> A discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and

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[15] Paragraph 44 of Army Regulations 615-360, dated May 25, 1944, covering discharges of enlisted men, pertinently provided as follows:

"When involving desertion from prior military service.—a. When an enlisted man who has enlisted or been inducted is in a status of desertion from prior service in the Army.

(1) If the statute of limitations is not applicable the enlisted man will be dropped from his current service and held to his first unterminated service and the appropriate commanding officer will dispose of the charges of desertion. See AR 615-300.

(2) If the statute of limitations is applicable, he will be discharged from the prior service from which he deserted, by reason of desertion and trial barred by 39th Article of War and he will be retained in his current service.

(3) When an enlisted man is dropped an appropriate entry will be made in the service record for the period of service from which dropped, showing why so dropped and to which period of service held, adding other desired data as to records and reports. See also AR 345-125."

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> therefore does not terminate other subsisting enlistments or relieve the soldier from liability to trial by court-martial for an offense committed during any of such enlistments.[16]

See also, Winthrop, *Dig. Op. JAG, 1895*, p. 360:

> *Held* that an honorable discharge was simply a termination of the particular enlistment which the soldier was then serving; that it was a discharge only from that enlistment, and did not apply to, or discharge from, other prior unexpired enlistments if any. * * * Unlike a dishonorable discharge, * * * an honorable discharge from one enlistment does not release the soldier from the consequences of a desertion committed under a prior enlistment.

Dig. Op. JAG, 1912, p. 462:

> XXII A. An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment.

Dig. Op. JAG, 1912-1940, p. 381:

> A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's

[16] The 1949 Manual for Courts-Martial, United States Army, contains the same language (p. 10), except that the words "or bad conduct" are added after the word "dishonorable."

> proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917, which became effective as to him on August 5, 1917. 251.29, Jan. 25, 1919.

In CM 336336, *Case of Taylor* (not reported), the Board of Review, on May 13, 1949, held legally sufficient a conviction for desertion where the accused had received an honorable discharge from a subsequent enlistment.

This long-established interpretation is entitled to great weight. *Hiatt* v. *Brown*, 339 U.S. 103, 109; *Hirshberg* v. *Cooke*, 336 U.S. 210, 216. And see 28 Op. Atty. Gen. 83, 88, where the Attorney General said:

> I see no reason to believe that Congress had in mind any fixed definition of its own of an honorable discharge, * * * as distinguished from the notion of adopting the possibly varying practices of the two departments. In other words, I do not think that Congress intended to go behind any conceptions and practices of the War Department and the

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conceptions of American military men in the matter of an honorable discharge, or to go behind any such conceptions and practice in the Navy Department and service, even if that should differ from the practice of the War Department and army.

Petitioner relies principally upon *Ex parte Drainer,* 65 F. Supp. 410 (N. D. Calif.), affirmed *sub nom. Gould* v. *Drainer,* 158 F. 2d 981 (C.A. 9), involving a desertion from the Marine Corps which was held to be exonerated by a discharge from a subsequent enlistment. The Articles for the Government of the Navy, as distinguished from AW 107, did not make mandatory the serving of time lost in desertion,[17] nor did they prohibit a discharge prior to the end of the term of an enlistment, as is the case under AW 108. Accordingly, the *Drainer* decision is distinguishable.

It should be noted that Congress has now adopted for the entire military service the Army's interpretation of the effect of a discharge. Subdivision (c) of Article 3 of the new Uniform Code of Military Justice (64 Stat. 109; 50 U.S.C., Supp. IV, 553 (c)) provides that "Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent

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[17] The Act of May 21, 1928 (45 Stat. 620, 34 U.S.C. 183a) provides that Navy deserters "may be permitted to serve" time lost.

period of service." This provision was prompted by *Ex parte Drainer*. House Report No. 491, 81st Cong., 1st sess., April 28, 1949, p. 12. Moreover, the *Drainer* decision ascribes undue weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34. The *Kelly* case did not involve court-martial jurisdiction. It concerned a soldier who had deserted, who had then been restored to duty by the commander competent to bring him to trial for desertion and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion.[18] On the other hand, in *United States* v. *Landers*, 92 U.S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to bounty, notwithstanding that his restoration to duty was followed by an honorable discharge. Obviously the characterization of *Kelly's* discharge as a final judgment of the Government does not support the view that such a discharge affects a desertion under an earlier,

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[18] Since the circumstances under which *Kelly* was restored to duty amounted to a condonation of his offense (Winthrop, *Military Law and Precedents* *406; Manual for Courts-Martial (1949), Par. 69*b*), the same result would have followed if the Government had been permitted to go behind the discharge.

separate, and uncompleted enlistment.[19] See *United States* v. *Sweet*, 189 U.S. 471.

Hirshberg v. *Cooke*, 336 U.S. 210, and the other cases on which petitioner relies are all inapplicable since they all involve only the effect of an honorable discharge on offenses committed during the particular enlistment to which the discharge related. They do not raise the question here involved, i.e. whether an honorable discharge goes back beyond the term to which it purports to relate so as to have the effect of condoning a desertion during a term of enlistment for which there is on the record no discharge.[20]

The rule which petitioner wishes the courts now to adopt is an extremely artificial and illogical one. It would permit a wartime deserter, who has committed a heinous offense[21] which is subject to

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[19] In the case entitled *In the Matter of the Application of Robert A. Hamilton for a Writ of Habeas Corpus*, No. 30134 (N.D. Calif., So. Div.), petitioner had received an honorable discharge before expiration of his term of enlistment in order to reenlist for three years. There was no *hiatus* in his service. He contended that the honorable discharge barred trial by court-martial for a larceny committed prior to the date of the discharge. Judge Roche, who authored the *Drainer* opinion, held on January 22, 1951, that "the honorable discharge certificate dated February 15, 1950, delivered to petitioner, was not a formal final judgment upon the petitioner's service in the Armed Forces of the United States, and such discharge did not operate to divest the General Court-Martial aforesaid of jurisdiction to try him for the offense charged."

[20] For this reason, petitioner's assertion that this case involves the status of discharged veterans generally is unsound. The only persons affected are those in the same status as petitioner, who deserted and failed to reveal their prior enlistment on induction into the Army.

[21] The seriousness with which Congress regards desertion is indicated by the fact that a court-martial conviction resulting

no statute of limitations (AW 39, 10 U.S.C., Supp. IV, 1510), to escape prosecution by committing another wrongful act, fraudulently enlisting without revealing his prior enlistment. Such a ruling would be particularly unrealistic in the light of the practical situation confronting the Army after the termination of hostilities in World War II. This Court is undoubtedly aware of the public clamor after the cessation of hostilities for the return of servicemen from overseas and for their discharge. During the fiscal year 1946 over 7,500,000 persons were separated from the Army. Annual Report of the Secretary of the Army 1948, Tables 20-22. These persons were separated before their terms of service were completed. See Extension of Service Act, *supra*. Authority to order their discharge was granted to separation center commanders by paragraph 13*a* of War Department Circular 188, dated June 23, 1945 (See AW 108). At the time of petitioner's discharge there were 21 separation centers in the United States. (Change No. 1 to Appendix 1, War Department Readjustment Regulations 1-2, January 31, 1946). Much of the processing for separation of overseas troops was completed before their return to the states (see par. 4, RR 1-1, March 18, 1946). Section IV of Circular 188, *supra*, directed that "Processing at separa-

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in a dishonorable discharge is ground for loss of citizenship. 8 U.S.C. 801(g); see *Roberts* v. *United States District Court*, 339 U.S. 844.

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tion centers will normally be scheduled to effect release of personnel received within 48 hours after arrival."

The only effective method of discovering deserters is by means of fingerprints. With millions of persons involved, names mean little in the military service. Serial numbers are the prime means of identification. Deserters naturally disclaim prior service at induction, and receive new serial numbers, as petitioner did. To have compared the fingerprints of persons prior to separation with those of known deserters would have been a colossal task and would have seriously hampered the demobilization. To hold under these circumstances that petitioner's discharge is entitled to the effect he urges would obviously be in disregard of the realities of the situation. If the "formal final judgment" language of *United States* v. *Kelly, supra,* decided by this Court in the December, 1872 Term, and relied upon by the Court in the *Drainer* case, ever was applicable to matters concerning court-martial jurisdiction, and we contend it never was, it manifestly should not be held to be applicable under conditions prevalent in this period. Nor can it be said that there existed a duty at any time on the part of the Army to have the names and fingerprints of the millions of inductees compared with those of known deserters. In this respect it should be noted that petitioner's contention is that his honorable discharge, not his subsequent military serv-

ice, terminated military jurisdiction and in effect pardoned the desertion.[22]

Not only would the sustaining of petitioner's contention ignore realities, but it would be a contradiction of the rule that enlistment is a contract with its concomitant obligations.[23] *In re Grimley, supra; In re Morrissey, supra.* It would thwart the clear intent of Congress that soldiers should not be permitted to evade their enlistment obligations by deserting (Articles 28, 107 and 108) and that wartime deserters should not escape serious punishment (Article 39; 8 U.S.C. 801(g)). It is submitted that petitioner's 1946 discharge for the period from 1944 to 1946 did not deprive the general court-martial of jurisdiction to try him for his 1943 desertion.

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[22] See 31 Op. Atty. Gen. 419 (1919) in which the Attorney General, in an exhaustive opinion, reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law and that a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor. In the present case petitioner does not claim that the military authorities had knowledge of the offense at the time he received his discharge certificate.

[23] See 59 Harv. L. R. 1156, 1157 (1946) which comments that:

> * * * As a matter of statutory interpretation, since a discharge purports to relate only to the enlistment for which it is given, it seems unrealistic to hold that it must be a termination of liability resulting from prior service.

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CONCLUSION

We respectfully submit that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER, 1951.

APPENDIX A

The pertinent provisions of the Articles of War, Act of June 4, 1920, chapter 227, subchapter II, 41 Stat. 787, are as follows:

Art. 28 [10 U.S.C. 1499]:

> Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Art. 58 [10 U.S.C. 1530]:

> Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

Art. 107 [10 U.S.C. 1579]:

> Every soldier who in an existing or subsequent enlistment deserts the service of the United States * * * shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform

duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

Art. 108 [10 U.S.C. 1580]:

No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

The pertinent provisions of the Articles of War, as amended by the Act of June 24, 1948, c. 625, title II, 62 Stat. 634, 635, 638, 639, are as follows:

Art. 47 [10 U.S.C., Supp. IV, 1518] Action by convening authority—* * *

* * * * *

(c) Action on record of trial.

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The

Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

(d) Approval.

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

* * * * *

Art. 50 [10 U.S.C., Supp. IV, 1521] Appellate review—* * *

* * * * *

(e) Action by Board of Review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.

No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by gen-

eral court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening

authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

* * * * *

(g) Weighing evidence.

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

* * * * *

Art. 51 [10 U.S.C., Supp. IV, 1523] Mitigation, remission, and suspension of sentences —(a) At the time ordered executed.

The power of the President, the Secretary of the Department of the Army, and any reviewing authority to order the execution of a sentence of a court-martial shall include the power to mitigate, remit, or suspend the whole or any part thereof, except that a death sentence may not be suspended. * * *

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Art. 53 [10 U.S.C., Supp. IV, 1525] Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate Gen-

> eral or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Section 2[24] of the Act of December 13, 1941, c. 571, 55 Stat. 799, 800, 50 U.S.C. App. 732 (Extension of Service Act), provided:

> The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section [during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war]: *Provided*, That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

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[24] The Joint Resolution of July 25, 1947, c. 327, Sec. 3, 61 Stat. 451 (see 50 U.S.C. App., Supp. IV, 732), provided that in the interpretation of this section relating to the extension of periods of service, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress.

APPENDIX B

The following documents are of record in the official file, No. 339567, of The Judge Advocate General's Office:

HEADQUARTERS FIFTH ARMY

Chicago 15, Illinois

7 December, 1949.

In the foregoing case of Recruit William H. Giese, RA 6 758 678, 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, the sentence is approved, but the period of confinement is reduced to ten months and the dishonorable discharge is mitigated to a bad conduct discharge.

The Post Guardhouse, Fort Sheridan, Illinois, is designated as the place of confinement.

Pursuant to Article of War 50e, the order directing the execution of the sentence is withheld.

[Signed] S. J. CHAMBERLIN,
S. J. CHAMBERLIN,
Lieutenant General, U. S. Army,
Commanding.

DEPARTMENT OF THE ARMY

Office of The Judge Advocate General,
Washington 25, D. C.
Board of Review

CM 339657 30 October 1950.

UNITED STATES

v.

RECRUIT WILLIAM H. GIESE (RA 6758678), 5012 Area Service Unit, Station Complement, Head-

quarters Company, Detachment #3, Fort Sheridan, Illinois.

Fifth Army

Trial by G.C.M., convened at Chicago, Illinois, 16 and 30 June and 7 July 1949. Bad conduct discharge, total forfeitures after promulgation and confinement for ten (10) months. Post Guardhouse.

HOLDING BY THE BOARD OF REVIEW

GUIMOND, BISANT AND OEDING

Officers of the Judge Adocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

[Signed] J. A. GUIMOND, J.A.G.C.
[Signed] OSCAR M. BISANT, J.A.G.C.
[Signed] ERNST C. OEDING, J.A.G.C.

1st Indorsement

October 31, 1950.

Dept. of Army J.A.G.C.

To the Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit William H. Giese (RA 6758678), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the

findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

[CM 339657].

For the Judge Advocate General;
[Signed] W. P. CONNALLY, JR.,
WILLIAM P. CONNALLY, JR.,
Colonel, JAGC,
Assistant Judge Advocate General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 968704 193

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Office-Supreme Court, U. S.
FILED
OCT 10 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.,

Respondents.

PETITION FOR A REHEARING.

ALBERT E. HALLETT,
231 South LaSalle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

ARNER F. BOND,
ROBERT E. CLEVELAND,
Of Counsel.

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vs.

LIEUTENANT GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, ET AL.,

Respondents.

PETITION FOR REHEARING.

The petitioner, William H. Giese, prays that this Court grant a rehearing of its order of October 15, 1951 (affirming the judgment of the Court of Appeals for the Seventh Circuit by an equally divided Court, and noting that "Mr. Justice Minton did not participate in the consideration or decision of this case") and, pursuant to Rule 33(1), briefly and distinctly states the following grounds therefor:

REASONS FOR GRANTING A REHEARING.

The Court of Appeals, very reluctantly (R. 56) deeming itself to be without power to pass upon the petitioner's basic contention that he was a *civilian, not* subject to trial by the military, *held* that an individual convicted by court-

martial *cannot* resort to habeas corpus *until* he has exhausted all administrative review procedures available to military personnel under the Articles of War, and therefore reversed the trial court's judgment (discharging the petitioner), with directions to remand the petitioner to the custody of the respondents, without prejudice to his making a new application after exhausting such remedies (R. 53-57). Such is the decision which this Court's order of October 15, 1951 allows to stand in this case.

As this Court recognized by granting certiorari (71 S. Ct. 613), the Court of Appeals' said decision not only conflicted in its ultimate result with the contrary decision of the Ninth Circuit in the *Drainer* case,[1] but decided an important question of Federal law which has never been, but should be, authoritatively settled by this Court because of the obvious impact of such a ruling not only upon some 7,500,000 honorably discharged army veterans of World War II (Respondents' Brief, p. 34) but upon some 150,000,000 *civilians* who, relying upon their constitutional guarantees of habeas corpus and grand juries except where they are in "the land or naval forces"[2] and upon a long line of judicial decisions unbroken until now,[3] have heretofore *assumed* that a *civilian*, wrongfully convicted by a court-martial having *no* jurisdiction over his *person*, was entitled to a determination of his *status* by a *civil* court

1. *Ex parte Drainer*, 65 F. Supp. 410, affirmed, *sub nom. Gould* v. *Drainer*, 158 F. 2d 981.

2. Art. I, §9, U. S. Constitution; Vth Amendment thereto.

3. *Wise* v. *Withers*, 3 Cranch 329, 2 L. Ed. 457 (1805); *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650 (1830); *United States ex rel. Sanantonio* v. *Warden*, 265 F. 787 (1919); *United States ex rel. Viscardi* v. *MacDonald*, 265 F. 695 (1920); *Ex parte Wilson*, 33 F. 2d 214 (1929); *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (1929); *Billings* v. *Truesdell*, 321 U. S. 542 (1944); *Ex parte Drainer*, 65 F. Supp. 410, affirmed, *sub nom. Gould* v. *Drainer*, 158 F. 2d 981 (1947); *United States ex rel. Hirshberg* v. *Cook*, 336 U. S. 210 (1949).

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and, if successful, to his immediate discharge from military custody, *without* waiting months or perhaps years for the completion of the devious administrative review procedures established by the Articles of War, which apply only to military personnel.

As pointed out in our petition, briefs and oral argument, neither *Gusik* v. *Schilder*, 340 U. S. 128, nor *Whelchel* v. *McDonald*, 340 U. S. 122, both decided during the October 1950 term, passed on this vital issue because *neither* of said cases involved a soldier who had received an honorable *discharge* and *both* were admittedly still on active duty at the time of their trial and conviction by court-martial.

Thus the present affirmance by an equally divided Court leaves the state of the law on this highly important question of Federal law still in a state of uncertainty and flux and might well, in a subsequent case, result in a contrary decision on the same issue (see, *e. g.*, *Hurst* v. *Moore-McCormack Line*, 328 U. S. 707, overruled in substance in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783).

We fully appreciate, as is well stated in Stern and Gressman's recent (1950) Supreme Court Practice, at page 327, that:

> "* * * when the equal division has resulted from a failure of a member of the Court to participate for *personal* reasons, and the petition for rehearing *will not result in his participation*, the mere fact of the equal division will not cause the petition to be granted (*e. g.*, *Stemmer* v. *New York*, 336 U. S. 963, 337 U. S. 921), although it may be granted for other reasons (*Marzani* v. *United States*, 335 U. S. 895, 336 U. S. 910, 922, * * *)." (Emphasis ours and footnotes transposed into text.)

and, were this a case where the ninth Justice (Mr. Justice Minton), needed to break the tie, would be unavailable for

a long period of time or where, for *personal* reasons (such as his having participated in the decision of the court below or his having been Attorney or Solicitor General at the time of such decision), he deemed himself *disqualified* from participating in the consideration or decision of the case, this petition for a rehearing would not have been filed; but such is *not* the situation in the case at bar.

On the *contrary*, so far as we are advised, Mr. Justice Minton is in *no* way *disqualified* from participating in the consideration or decision of this case (he was a Justice of this Court long before the Court of Appeals' decision on October 5, 1950), and he was, as this Court knows, unable to participate here only because of an injury which, while it temporarily incapacitated him, is apparently not of such a permanent character as to prevent his participating in a reargument or new decision in the relatively near future.

Under such circumstances we submit that it would be highly appropriate, and certainly not without sound precedent[4], for this Court to grant a rehearing in this case in order to afford Mr. Justice Minton an opportunity to participate in the consideration and decision of this case in order to break the tie.

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4. In Stern and Gressman's said Supreme Court Practice, at page 327, it is said:

> "Despite the above limitations, rehearings are normally granted when the prior decision was by an equally divided Court, and a new Justice is available to break the tie. *E.g. Gray* v. *Powell*, 312 U. S. 666, 313 U. S. 596, 314 U. S. 402; *Halliburton Co.* v. *Walker*, 326 U. S. 696, 327 U. S. 812, 329 U. S. 1."

In *People of the State of Illinois ex rel. Gordon* v. *Campbell*, 327 U. S. 819, this Court, after hearing full oral argument and deciding without dissent a companion case (*People of the State of Illinois ex rel. Gordon* v. *United States*, 328 U. S. 8) on its merits, *deferred* its decision pending Mr. Justice Jackson's return from the Nuremberg trials, "restored" the case to the docket for the next year and assigned it "for reargument before a full bench."

CONCLUSION.

For the reasons above set forth and those set forth in our petition for certiorari, briefs and oral argument, the petitioner prays that a rehearing be granted and that, upon such rehearing, the judgment of the Court of Appeals for the Seventh Circuit be reversed in its entirety or be reversed and remanded with appropriate directions.

Respectfully submitted,

ALBERT E. HALLETT,
231 South LaSalle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

ABNER F. BOND,
ROBERT E. CLEVELAND,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify, under Rule 33, that the above and foregoing petition is presented in good faith and not for delay.

.....

Attorney for Petitioner.

No. 10. UNITED STATES EX REL. GIESE *v.* CHAMBERLIN, COMMANDING GENERAL, ET AL. Certiorari, 341 U. S. 902, to the United States Court of Appeals for the Seventh Circuit. Argued October 9, 1951. Decided October 15, 1951. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE MINTON took no part in the consideration or decision of this case. *Albert E. Hallett* argued the cause and filed a brief for petitioner. *John F. Davis* argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg*. Reported below: 184 F. 2d 404.

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